Comparative principles of security interests : secured debt and charged property

Rover, Jan-Hendrik

COMPARATIVE PRINCIPLES OF SECURITY INTERESTS:

SECURED DEBT AND CHARGED PROPERTY

Jan-Hendrik Röver, LL.M. (L.S.E.)

King's College London

Ph.D. thesis

Supervisor:
Prof. Dr. Jan Hendrik Dalhuisen, LL.M. (UC at Berkeley), FCI Arb. (London)

2004

Abstract of Thesis

1. The study starts with a distinction of three dimensions of comparative law, an analytical, an empirical and a normative dimension. This distinction lays the foundation for the rest of the study.

2. It then introduces the principles method of comparative law. Comparative legal principles, it is held, have to comply with four criteria: they have to be functional, positive, general and potentially universal. The intention behind introducing the concept of comparative legal principles is to improve the practicability of comparative law. It is also intended to avoid the "universalistic fallacy" which is often found in comparative law. Examples for the universalistic fallacy are identified with Rabel's "general principles", Esser's "universal principles" or Schlesinger's "common core". Contrary to these concepts legal principles are understood in this study as mere analytical tools.

3. The next tool for the ensuing comparison of this study is identified in normative criteria. It is shown that the analytical principles can be evaluated on the basis of the micro- and macroeconomic functions of security. As the most important function the risk-reducing function of security is identified. Other microeconomic functions of security are the function to provide information about the debtor and the prevention of risk shifting. In addition, the study points out the macroeconomic importance of security (which supports lending and investment in an economy and assists in the efficient allocation of resources in an economy).

4. On the basis of the principles method of comparative law and the normative principles a number of functional principles of security law are described which show the understanding of secured debt and charged property in several legal systems. The study describes legal concepts which are developed from specific legal issues and which are evaluated on the basis of normative criteria. The present study demonstrates that the principles method can lead to specific, practical results.

Summary Table of Contents

Table of Contents

Part III
The Secured Debt

8 The contents of the secured debt

8.1 Legal issue
8.2 Legal solutions
8.2.1 English law
8.2.1.1 Debts
8.2.1.2 Monetary and non-monetary obligations
8.2.1.3 Unconditional and conditional debts
8.2.1.4 Present and future debts
8.2.1.5 Debts governed by local or by foreign law
8.2.1.6 Validity and enforceability of the secured debt
8.2.1.7 Advance
8.2.2 American law
8.2.2.1 Debts
8.2.2.2 Monetary and non-monetary obligations
8.2.2.3 Unconditional and conditional debts
8.2.2.4 Present and future debts
8.2.2.5 Debts governed by local or by foreign law
8.2.2.6 Validity and enforceability of the secured debt
8.2.2.7 Value
8.2.3 German law
8.2.3.1 Debts
8.2.3.2 Monetary and non-monetary obligations
8.2.3.3 Unconditional and conditional debts
8.2.3.4 Present and future debts
8.2.3.5 Debts governed by local or by foreign law
8.2.3.6 Validity and enforceability of the secured debt
8.2.3.7 Value
8.2.4 Model Law on Secured Transactions
8.2.4.1 Debts
8.2.4.2 Monetary and non-monetary obligations
8.2.4.3 Unconditional and conditional debts
8.2.4.4 Present and future debts
8.2.4.5 Debts governed by local or by foreign law
8.2.4.6 Validity and enforceability of the secured debt
8.2.4.7 Advance
8.3 Legal principles
8.3.1 Analytical principles
8.3.1.1 General principles
8.3.1.1.1 General remarks
8.3.1.1.2 Specific remarks
8.3.1.2 Debts
8.3.1.2.1 General remarks
8.3.1.2.2 Specific remarks

8.3.1.3 Monetary and non-monetary obligations
8.3.1.4 Unconditional and conditional debts
8.3.1.5 Present and future debts
8.3.1.6 Debts governed by local or by foreign law
8.3.1.7 Validity and enforceability of the secured debt
8.3.1.8 Advance
8.3.2 Normative evaluation
8.3.2.1 General principles
8.3.2.2 Debts
8.3.2.3 Monetary and non-monetary obligations
8.3.2.4 Unconditional and conditional debts
8.3.2.5 Present and future debts
8.3.2.6 Debts governed by local or by foreign law
8.3.2.7 Validity and enforceability of the secured debt
8.3.2.8 Advance

9 The extent of the secured debt

9.1 Legal issue
9.2 Legal solutions
9.2.1 English law
9.2.1.1 Principal amounts
9.2.1.1.1 One or more debts
9.2.1.1.2 Maximum amount
9.2.1.1.3 Static and dynamic security
9.2.1.2 Additional amounts
9.2.1.2.1 Agreement between the parties
9.2.1.2.2 Operation of law
9.2.2 American law
9.2.2.1 Principal amounts
9.2.2.1.1 One or more debts
9.2.2.1.2 Maximum amount
9.2.2.1.3 Static and dynamic security
9.2.2.2 Additional amounts
9.2.2.2.1 Agreement between the parties
9.2.2.2.2 Operation of law
9.2.3 German law
9.2.3.1 Principal amounts
9.2.3.1.1 One or more debts
9.2.3.1.2 Maximum amount
9.2.3.1.3 Static and dynamic security
9.2.3.2 Additional amounts
9.2.3.2.1 Agreement between the parties
9.2.3.2.2 Operation of law
9.2.4 Model Law on Secured Transactions
9.2.4.1 Principal amounts
9.2.4.1.1 One or more debts
9.2.4.1.2 Maximum amount

9.2.4.1.3 Static and dynamic security
9.2.4.2 Additional amounts
9.2.4.2.1 Agreement between the parties
9.2.4.2.2 Operation of law

9.3 Legal principles
9.3.1 Analytical principles
9.3.1.1 Principal amount
9.3.1.1.1 One or more debts
9.3.1.1.2 Maximum amount
9.3.1.1.3 Static and dynamic security
9.3.1.2 Additional amounts
9.3.1.2.1 Agreement between the parties
9.3.1.2.2 Operation of law
9.3.2 Normative evaluation
9.3.2.1 Principal amount
9.3.2.1.1 One or more debts
9.3.2.1.2 Maximum amount
9.3.2.1.3 Static and dynamic security
9.3.2.2 Additional amounts
9.3.2.2.1 Agreement between the parties
9.3.2.2.2 Operation of law

10 The relationship between secured debt and security interest

10.1 Legal issue
10.2 Legal solutions
10.2.1 English law
10.2.2 American law
10.2.3 German law
10.2.3.1 Relationship between security right and secured debt
10.2.3.2 Relationship between security right and obligation to create a security right
10.2.4 Model Law on Secured Transactions
10.2.4.1 Relationship between charge and secured debt
10.2.4.2 Relationship between security right and obligation to create a charge
10.3 Legal principles
10.3.1 Analytical principles
10.3.1.1 Relationship between security interest and secured debt
10.3.1.2 Relationship between security interest and obligation to create a security interest
10.3.2 Normative evaluation
10.3.2.1 Relationship between security interest and secured debt
10.3.2.2 Relationship between security interest and obligation to create a security interest

Part IV
Charged Property

11 The type of charged property

- 11.1 Legal issue
- 11.2 Legal solutions
  - 11.2.1 English law
    - 11.2.1.1 Property
      - 11.2.1.1.1 Things and rights
      - 11.2.1.1.2 Title
      - 11.2.1.1.3 Prohibitions on granting security
    - 11.2.1.2 Present and future property
    - 11.2.1.3 Unconditional and conditional property
    - 11.2.1.4 Property inside and outside the jurisdiction
  - 11.2.2 American law
    - 11.2.2.1 Property
      - 11.2.2.1.1 Things and rights
      - 11.2.2.1.2 Title
      - 11.2.2.1.3 Prohibitions on granting security
    - 11.2.2.2 Present and future property
    - 11.2.2.3 Unconditional and conditional property
    - 11.2.2.4 Property inside and outside the jurisdiction
  - 11.2.3 German law
    - 11.2.3.1 Property
      - 11.2.3.1.1 Things and rights
      - 11.2.3.1.2 Ownership
      - 11.2.3.1.3 Prohibitions on granting security
    - 11.2.3.2 Present and future property
    - 11.2.3.3 Unconditional and conditional property
    - 11.2.3.4 Property inside and outside the jurisdiction
  - 11.2.4 Model Law on Secured Transactions
    - 11.2.4.1 Property
      - 11.2.4.1.1 Things and rights
      - 11.2.4.1.2 Ownership
      - 11.2.4.1.3 Prohibitions on granting security
    - 11.2.4.2 Present and future property
    - 11.2.4.3 Unconditional and conditional property
    - 11.2.4.4 Property inside and outside the jurisdiction
- 11.3 Legal principles
  - 11.3.1 Analytical principles
    - 11.3.1.1 Property
      - 11.3.1.1.1 Things and rights
      - 11.3.1.1.2 Title or ownership
      - 11.3.1.1.3 Prohibitions on granting security
    - 11.3.1.2 Present and future property
    - 11.3.1.3 Unconditional and conditional property

11.3.1.4 Property inside and outside the jurisdiction

11.3.2 Normative evaluation

11.3.2.1 Property

11.3.1.1.1 Things and rights

11.3.1.1.2 Title or ownership

11.3.1.1.3 Prohibitions on granting security

11.3.2.2 Present and future property

11.3.2.3 Unconditional and conditional property

11.3.2.4 Property inside and outside the jurisdiction

12 The extent of charged property

12.1 Legal issue

12.2 Legal solutions

12.2.1 English law

12.2.1.1 Principal charged property

12.2.1.1.1 One or more assets

12.2.1.1.2 Maximum value of charged property

12.2.1.1.3 Static and dynamic security

12.2.1.2 Additional charged property

12.2.1.2.1 Agreement between the parties

12.2.1.2.2 Operation of law: proceeds of sale and products

12.2.2 American law

12.2.2.1 Principal charged property

12.2.2.1.1 One or more assets

12.2.2.1.2 Maximum value of charged property

12.2.2.1.3 Static and dynamic security

12.2.2.2 Additional charged property

12.2.2.2.1 Agreement between the parties: proceeds and products

12.2.2.2.2 Operation of law

12.2.2.2.2.1 Proceeds

12.2.2.2.2.2 Products

12.2.2.2.2.3 Fixtures and insurance proceeds

12.2.3 German law

12.2.3.1 Principal charged property

12.2.3.1.1 One or more assets

12.2.3.1.1.1 One asset

12.2.3.1.1.2 Several assets

12.2.3.1.2 Maximum value of charged property

12.2.3.1.3 Static and dynamic security

12.2.3.2 Additional charged property

12.2.3.2.1 Agreement between the parties

12.2.3.2.1.1 Proceeds of sale

12.2.3.2.1.3 Products

12.2.3.2.2 Operation of law

12.2.4 Model Law on Secured Transactions
12.2.4.1 Principal charged property
12.2.4.1.1 One or more assets
12.2.4.1.1.1 One asset
12.2.4.1.1.2 Several assets
12.2.4.1.2 Maximum value of charged property
12.2.4.1.3 Static and dynamic security
12.2.4.2 Additional charged property
12.2.4.2.1 Agreement between the parties
12.2.4.2.1.1 Agreements in general
12.2.4.2.1.2 Proceeds of sale
12.2.4.2.1.3 Products
12.2.4.2.2 Operation of law

12.3 Legal principles
12.3.1 Analytical principles
12.3.1.1 Principal charged property
12.3.1.1.1 One or more assets
12.3.1.1.2 Maximum value of charged property
12.3.1.1.3 Static and dynamic security
12.3.1.2 Additional charged property
12.3.1.2.1 Proceeds and products
12.3.1.2.2 Fixtures and appertunances
12.3.2 Normative evaluation
12.3.2.1 Principal charged property
12.3.2.1.1 One or more assets
12.3.2.1.1.1 One asset
12.3.2.1.1.2 Several assets
12.3.2.1.2 Maximum value of charged property
12.3.2.1.3 Static and dynamic security
12.3.2.2 Additional charged property
12.3.2.2.1 Proceeds of sale
12.3.2.2.2 Products

13 The relationship between charged property and security interest

13.1 Legal issue
13.2 Legal solutions
13.2.1 English law
13.2.1.1 Creation
13.2.1.2 Extent
13.2.1.3 Transfer of title
13.2.1.4 Defences
13.2.1.5 Termination
13.2.1.6 Enforcement
13.2.2 American law
13.2.2.1 Creation
13.2.2.2 Extent
13.2.2.3 Transfer of title

13.2.2.4 Defences
13.2.2.5 Termination
13.2.2.6 Enforcement
13.2.3 German law
13.2.3.1 Creation
13.2.3.2 Extent
13.2.3.3 Transfer of ownership
13.2.3.4 Defences
13.2.3.5 Termination
13.2.3.6 Enforcement
13.2.4 Model Law on Secured Transactions
13.2.4.1 Creation
13.2.4.2 Extent
13.2.4.3 Transfer of title or ownership
13.2.4.4 Defences
13.2.4.5 Termination
13.2.4.6 Enforcement
13.3 Legal principles
13.3.1 Analytical principles
13.3.1.1 Creation
13.3.1.2 Extent
13.3.1.3 Transfer of title or ownership
13.3.1.4 Defences
13.3.1.5 Termination
13.3.1.6 Enforcement
13.3.2 Normative evaluation
13.3.2.1 Creation
13.3.2.2 Extent
13.3.2.3 Transfer of title or ownership
13.3.2.4 Defences
13.3.2.5 Termination
13.3.2.6 Enforcement

Part V
Summary and Results

1 Method of comparative law

1.1 Three dimensions of comparative law
1.2 Analytical principles of comparative law
1.3 Normative criteria of comparative law

2 Comparative principles of proprietary security

Annex

Annex 1: Text of the Model Law on Secured Transactions prepared by the European Bank for Reconstruction and Development (1994)

Annex 2: Core principles for a secured transactions law prepared by the European Bank for Reconstruction and Development (1997)

Bibliography

Table of Legislation

Abbreviations

A.C.	Law Reports, Appeal Cases, House of Lords and Privy Council (England and Wales)
AcP	Archiv für die civilistische Praxis (Germany)
AGBG	Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 1976 (Germany)
All E.R.	All England Law Reports (England and Wales)
Am.J.Comp.L.	American Journal of Comparative Law
art.	article
arts.	articles
BB	Betriebsberater (Germany)
BGB	Bürgerliches Gesetzbuch 1896 (Germany)
B.R.	Bankruptcy Reporter (United States)
C.L.J.	Cambridge Law Review (England and Wales)
Com. L. J.	Commercial Law Journal (United States)
diss.	dissertation (Ph.D. paper)
dto.	*dito*
EBRD	European Bank for Reconstruction and Development (London)
ECR	European Court Reports
ed.	editor; editors; edition
e.g.	*exampli gratia* (for example)
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch 1896 (Germany)
et seq.	*et sequens* (and the following pages)
George Washington L. Rev.	George Washington Law Review (United States)
GBO	Grundbuchordnung 1897 (Germany)
Harv. Int'l L.J.	Harvard International Law Journal (United States)
HBG	Handelsgesetzbuch 1897 (Germany)
ibid.	*ibidem* (in the same place)
IBRD	International Bank for Reconstruction and Development (Washington)
ICLQ	The International Comparative Law Quarterly
i.e.	*id est* (that is)
JuS	Juristische Schulung (Germany)
HGB	Handelsgesetzbuch (Germany)
JZ	Juristenzeitung (Germany)
lit.	*littera* (letter)
La. L. Rev.	Louisiana Law Review (United States)
Minn. L. R.	Minnesota Law Review (United States)
MLST	EBRD Model Law on Secured Transactions 1994
NJW	Neue Juristische Wochenschrift (Germany)
no.	number
OJ	Official Journal of the European Communities
op. cit.	*opere citato* (in the work already named)
Oxford J.Leg.Stud.	Oxford Journal of Legal Studies

p.	page
para.	paragraph
pp.	pages
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (Germany)
sec.	section
UCC	Uniform Commercial Code 1998 with 2001 Amendments (United States)
UCC Rep. Serv.	Uniform Commercial Code Reporting Service (United States)
U.S.C.	United States Code
UNCITRAL	United Nations Commission on International Trade Law (Vienna)
UNIDROIT	Institut pour l'Unification de Droit Privé (Rome)
Utah L. Rev.	Utah Law Review (United States)
ZHR	Zeitschrift für das gesamte Handels- und Wirtschaftsrecht (Germany)
ZPO	Zivilprozeßordnung 1877 (Germany)
ZVG	Gesetz über die Zwangsversteigerung und die Zwangsverwaltung 1897 (Germany)

Glossary of Security Law Terms

National law term	English term
English law	
	equitable charge
	fixed charge
	floating charge
	legal mortgage
	equitable mortgage
	pledge
	lien
	legal assignment
	equitable assignment
	retention of title/reservation of title
	hire purchase
US-American law	
	security interest in personal property
German law	
Hypothek	accessory land mortgage
Höchstbetragshypothek	accessory land mortgage with a maximum amount
Sicherungshypothek	strict land mortgage
einfache Grundschuld	simple non-accessory land mortgage
Sicherungsgrundschuld	non-accessory land mortgage by way of security
Eigentümergrundschuld	non-accessory land mortgage for the benefit of the owner
Renten(grund-)schuld	non-accessory annuity land mortgage
Pfandrecht an beweglichen Sachen	pledge in movable things
Pfandrecht an Forderungen	pledge in receivables/choses in action
Pfandrecht an sonstigen Rechten	pledge in other rights
Sicherungsübertragung	security transfer

Sicherungsübereignung beweglicher Sachen	security transfer of ownership in movable things
Sicherungsabtretung von Forderungen	security assignment of receivables/ choses in action
Sicherungsübertragung sonstiger Rechte	security transfer of other rights
einfache Sicherungsübertragung	simple security transfer
erweiterte Sicherungsübertragung	security transfer extended to other debts
verlängerte Sicherungsübertragung	security transfer extended to future property
Eigentumsvorbehalt	retention of ownership
einfacher Eigentumsvorbehalt	simple retention of ownership
erweiteter Eigentumsvorbehalt	retention of ownership extended to other debts
verlängerter Eigentumsvorbehalt	retention of ownership extended to future property
Sicherungsdienstbarkeit an beweglichen/ unbeweglichen Sachen	usufructus for security purposes in movable/immovable things
Sicherungsdienstbarkeit an Rechten	usufructus for security purposes in rights
Sicherungsdienstbarkeit an einem Vermögen	usufructus for security purposes in an estate
Sicherungsabrede/Sicherungsvertrag	security agreement
Factoring	factoring
Leasing	leasing
Model law on secured transactions	
	charge
	enterprise charge
	registered charge
	unpaid vendor's charge
	possessory charge
	specific charge
	class charge

Part I

Introduction

1 Scope of the study

Security interests have three main elements: (1) the secured debt, (2) the charged property and (3) the relationship between security interest and secured debt and charged property.[1] This study examines comparative principles of proprietary security related to all three main elements of security. Its aim is to explain the working of those elements in a number of legal systems and to summarise the findings into what I call comparative principles. The concept of a principles method of comparative law was developed in an earlier study.[2] This concept of a principles method of comparative law will be introduced in summary form at a later point. Here it suffices to underline that comparative principles are an analytical tool facilitating the understanding of foreign legal systems and that they are neither designed to serve in the mythical search for the "common core of legal systems" as the American comparatist Rudolf B. Schlesinger has called it[3] nor to supply supporting evidence for the "*praesumptio similitudinis*" of legal systems which was championed by Konrad Zweigert.[4] The main purpose of analytical principles and the principles method of comparative law is to facilitate legislative work based on the experience made in other legal systems. The analytical findings to each legal issue are evaluated, thus putting the analytical principles in a normative context.

---

[1] Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), p. 4 provides as essential elements of security: the purpose of security (i.e. the satisfaction of the creditor for a debt; *ibd.*, p. 5), the type of security interest (i.e. charge or pledge) and the combination of the purpose of security and the security interest. This trichotomy excludes implicitly charged property as a basic element of security interests but should by no means be interpreted as contradicting the view presented here. First, Becker-Eberhard focuses in his book on the relationship between secured debt and security and, therefore, leaves charged property at the side. He also encompasses *in personam* security such as guarantees which legally is not related to charged property but rather to a person's estate.

[2] See Jan-Hendrik Röver, Prinzipien. The principles based approach distinguishes this book clearly from the studies by P.A.U. Ali (The Law of Secured Finance. An International Survey of Security Interests over Personal Property [Oxford 2002]) and Tibor Tajti (Comparative Secured Transactions Law [Budapest 2002]).

[3] Rudolf B. Schlesinger, The Common Core of Legal Systems. An Emerging Subject of Comparative Study in Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard (eds.), XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema (Leiden 1961), pp. 65 *et seq.*

[4] Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (translated by Tony Weir), 3rd ed. (Oxford 1998), 3 III = p. 40.

It is the normative interest from which the selection of reference systems follows. The study uses as reference systems English, US-American and German law as well as the EBRD's Model Law on Secured Transactions.[5]

2 Structure of the study

The structure of this study follows from its scope and the methodology used. **Part II** will introduce the principles method of comparative law which I have developed in an earlier book. It will first develop a model of three dimensions of comparative law.[6] Building on this model it will introduce the principles method of comparative law proper.[7] As a normative science comparative law is concerned with the normative standards which it uses to evaluate certain legal rules. Economic research offers interesting insights into the functions of security and can help in the task of evaluating legal rules. Hence, the study will present an economic view of security on the basis of which comparative principles can be evaluated.[8] The final section of Part II is devoted to the legal systems examined in this study from which comparative principles will be derived. These legal systems are the law of England and Wales, US-American secured transactions law for security in movables (Article 9 UCC), German law and the EBRD Model Law on Secured Transactions. This model law is a result of comparative work on the basis of the principles method of comparative law and serves as a reference system in this study. Writing on the model law is, however, still limited and it seems appropriate to provide the reader with some background information before it is used in a comparative study.

Part III examines the comparative principles related to the secured debt (including the relationship between secured debt and security interest).

---

[5] For the latter see European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994) = Stephan Breidenbach and Christian Campbell (eds.), Business Transactions in Eastern Europe, vol. 2 (New York 1997), Appendix 1 = Sudebnik vol. 1 (1996), pp. 587-672 (English text and Russian translation) = Annex (English text) = Jan-Hendrik Röver, Prinzipien, Annex = pp. 191-226 (German translation).

[6] See chapter 3 below.

[7] See chapter 4 below.

[8] See chapter 5 below.

Part IV is devoted to the comparative principles dealing with the charged property (including the relationship between charged property and security interest).

Part II
The Principles Method of Comparative Law

3 The role of comparative law

3.1 Three dimensions of comparative law

We can distinguish three dimensions of comparative law:[9] an analytical, an empirical and a normative dimension.[10] The **analytical** dimension of comparative law is concerned with the understanding of the notions and, where it exists, of the system[11] of domestic and foreign law in force at a certain point in time. For the analytical dimension of comparative law it is important to develop an adequate, where possible neutral, terminology and to identify a set of relevant legal issues.

The **empirical** dimension of comparative law comprises all efforts to describe domestic and foreign law in force at a certain point in time. Often such efforts are belittled as being merely "descriptive comparative law"[12] where they are not related to comparative considerations. It must, however, be underlined that even the mere descriptions of foreign laws may be related to comparative law in two ways. The comparatist who concerns itself

---

[9] The English term "comparative law" is misleading because there can be no comparative **law** but only a comparison of laws. What we call comparative law is, therefore, a certain approach or method but not a body of rules of substantive law.

[10] See Jan-Hendrik Röver, Prinzipien, § 2 I = pp. 7-8. Also Wolfgang Fikentscher, Methoden des Rechts in vergleichender Darstellung, vol. III: Mitteleuropäischer Rechtskreis (Tübingen 1976), p. 781, who agrees with this distinction in substance but uses a differrent terminology; he derived his distinction from the work of the Swiss comparatist Adolf Schnitzer. - The present study concentrates on legal aspects and leaves aside e.g. historic and sociological aspects which may also form part of a comparative study.

[11] Josef Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, 4th ed. (Tübingen 1990), distinguished problem-oriented legal thinking in Anglo-American laws from axiomatic legal thinking in continental laws. Problem-oriented legal thinking is less concerned with systematic questions; *ibd.*, chapters X, XI = pp. 183-241.

with a foreign law will have to undertake analytical work in the sense of the first dimension of comparative law. In addition, the description of foreign laws is a valuable and necessary preparation for a later comparison (which takes place within the empirical dimension of comparative law). Its importance for any conflicts of law issues, which in the end rely on an application of the national law determined by the conflicts rules, should also not be underestimated.

Lastly, comparative law has a **normative**, i.e. evaluative dimension. It can be used for a critical assessment of domestic and/or foreign law. In this respect comparative law raises the question which legal model solves a legal issue in the most appropriate way and it provides a rational explanation for this. Comparative law allows the comparatist to distance itself from its own domestic law and its historically grown solutions. The knowledge of alternative solutions in foreign laws opens a way to a rational critique. However, this leaves open the question which criteria are supposed to guide such a critique.[13]

The three dimensions of comparative law are closely interlinked with each other. They are necessary elements in building a comparative perspective on the basis of foreign laws. Only taken together they enable a rational critique on the basis of comparative law. The regulative principles for scientific rationality in this respect are clarity of words, lack of contradictions and coherence.[14]

3.2 Challenges by critical comparative law

The foundations of traditional comparative law which features the three dimensions described above have been challenged by alternative approaches which can be summarised vaguely under the term **"legal post-modernism"**.[15] The alternative approaches which are

---

[12] Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (translated by Tony Weir), 3nd ed. (Oxford 1998), 1 III = p. 6.
[13] See chapter 5 below.
[14] See Robert Alexy, Theorie der Grundrechte (Frankfurt am Main 1986), p. 27.
[15] See the excellent summary and analysis by Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 who have also coined the term of the "legal version of post-modernism". The following summary is largely based on Peters' and Schwenke's analysis.

targeting traditional comparative law mainly developed by continental lawyers are raised foremost in the US and form part of a broader movement which is often summarised in the term "critical legal studies".[16] The concerns raised by legal post-modernism are serious enough that this study has to deal with them at least briefly.[17]

As Peters and Schwenke have pointed out,[18] legal post-modernism raises five main objections against traditional comparative law which they have called the framework theory, the comparatist's bias argument, the hegemony argument, the contempt of classification and the contempt of functionalism. First, legal post-modernism claims that legal thought is determined by insurmountable frameworks; hence, there is no common ground that guarantees the possibility of neutral and objective meaning and value. This framework theory is not only at the heart of legal post-modernism but of philosophical post-modernism generally.[19] On the basis of the framework theory critical comparative law should be concerned mainly with uncovering respective frameworks and, therefore, the focus of comparative law is shifted from the laws to be compared to the history, epistemology and politics of comparative research itself. The claim that frameworks are irreconcilable must be rejected for several reasons. The framework theory is a form of relativism, which is the position that neither universal knowledge exists (epistemic relativism), nor universally valid norms exist (moral relativism) because insights and values always depend on the standpoint of the epistemic or moral subject.[20] Relativism (here in the

---

[16] For critical legal studies see M. Kelman, A Guide To Critical Legal Studies (Cambridge Mass. 1987); R. Unger, The Critical Legal Studies Movement (Cambridge Mass. 1983); Horst Eidenmüller, Rights, Systems of Rights, and Unger's System of Rights: Part 1 in 10 Law and Philosophy, pp. 1-28; Horst Eidenmüller, Rights, Systems of Rights and Unger's System of Rights: Part 2 in 10 Law and Philosophy, pp. 119-59.

[17] From the post-modernist literature on comparative law see in particular Nathaniel Berman, Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion in (1997) Utah L. Rev., p. 281; Vivian Grosswald Curran, Cultural Immersion, Difference and Categories in U.S. Comparative Law in (1998) 46 Am.J.Comp.L., p. 43; Günter Frankenberg, Critical Comparisons: Re-thinking Comparative Law in (1985) 26 Harv. Int'l L.J., pp. 411-55, Günter Frankenberg, Stranger than Paradise: Identity & Politics in Comparative Law in (1997) Utah L. Rev., p. 259; Jonathan Hill, Comparative Law, Law Reform, and Legal Theory in (1989) 9 Oxford J.Leg.Stud., p. 101; David Kennedy, New Approaches to Comparative Law: Comparativism and International Governance in (1997) Utah L. Rev., p. 545, Pierre Legrand, Fragments on Law-as-Culture (Deventer 1999); Pierre Legrand, Le Droit Comparé (1999) and the review of the last two books by Esik Örücü in (2000) 49 ICLQ, pp. 996-7 as well as Legrand's review of Walter van Gerven et al. (eds.), Torts (Oxford 1998) in (1999) C.L.J., pp. 439-42; Catherine Rogers, Gulliver's Troubled Travels, or the Conundrum of Comparative Law in (1998) 67 George Washington L.Rev., p. 149.

[18] Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 (802).

[19] See François Lyotard, La condition postmoderne: Rapport sur le savoir (1979).

[20] Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 (813).

form of the claim that cross-cultural discourse is impossible) is, however, untenable since it is self-contradictory. It is obviously a self-contradiction if one asserts that two persons from two cultures can never have commensurable theories and tries to convince at the same time a person from another culture that cultural relativism is true.[21] Another argument against this form of relativism is that cultures are not hermetic, closed entities as the framework theory assumes but interchange in multiple ways. Moreover, there are specific arguments against the framework theory. Its consequence would be that we are never capable of achieving new knowledge or accept new knowledge which contradicts our own principles since we are all prisoners of specific frameworks. This assertion runs contrary to our everyday-life experience that we can experience something fundamentally and surprisingly new.[22]

Second, critical comparative law holds that comparatists are unavoidably biased due to their own pre-existing understanding.[23] Like the framework theory of which it is a variation the bias argument must be rejected as self-defeating. In order to raise the bias-reproach, post-modernist critique must be able to occupy a position beyond the frameworks since otherwise it could not recognise the bias. However, transcending the framework is what the critique cannot do according to its own theory. In addition, in order to be consistent the theory could have to conceive itself as bias which would again be self-defeating.[24]

Third, critical comparative law raises the hegemony argument against traditional comparative law and claims because there is no truth there is also no search for truth but only ideology. Legal scholarship generally becomes a mere means for gaining and keeping the exercise of power. This claim meets the arguments which have already been raised against epistemic relativism. It is also self-defeating in an additional way: If there is no truth but only ideology to camouflage aspirations of power then even the post-modernist

---

[21] Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 (814).

[22] A method for transcending general frameworks was developed by Wolfgang Fikentscher in the form of synepëics; see Wolfgang Fikentscher, Modes of Thought. A Study in the Anthropology of Law and Religion (Tübingen 1995), pp. 130-47.

[23] Or "Vorverständnis"; see Josef Esser, Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungsfindung (Frankfurt am Main 1972).

[24] Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 (821).

critique cannot be true but can only consider itself as an ideology to camouflage aspirations of power.[25]

Forth, a further post-modernist position is to question all types of (scientific) categories and classifications. However, the position of inescapable frameworks on which this scepticism of classification is founded has already been refuted.

Lastly, post-modern comparative law holds that the assumption of functionalism on which traditional comparative law is based is directed towards implied or outspoken universalism. Critical comparative law holds that the intellectual process of comparison is inescapably subjective, personal and contestable. This position is another variation of the framework theory in general and the bias and the hegemony argument more specifically. It is, therefore, subject to the same arguments mentioned above.

In summary, the programme of critical comparative law stands on shaky foundations as far as it is based on a strict framework theory claiming that cultural frameworks are insurmountable. This does not mean that comparative law should not take a broader approach than just comparing legal rules and should not take a broad approach towards analysing various legal functions.[26] But at the same time it should be noted that the fundamental programme of traditional comparative law has not been put seriously into question by post-modern comparative law.

4 The role of principles in comparative law

Josef Esser demonstrated in his groundbreaking study "*Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre*"[27] the role of principles as a medium for the development of national laws. From the widespread use of principles as a tool for legal

[25] Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 (824).
[26] For examples of different legal functions see Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34 (828).

development he concluded that the foremost task of comparative law would be to find "universal, not structure-related, fundamental principles" which are common at least to advanced legal systems.[28] His vision of legal systems which, in his opinion, would reveal under a varied surface an astonishingly common ground was shared by comparatists like Ernst Rabel, Rudolf B. Schlesinger and Konrad Zweigert. Rabel wrote in 1948: "'General principles', however, do exist in the most effective and comprehensive manner in private law. Legal history and modern systems of law manifest an abundant wealth of common ideas. Common law and civil law have never been so antagonistic as traditional prejudice presumes and more recently have appreciated each other in many respects."[29] Rudolf B. Schlesinger followed this vision by postulating a "common core of legal systems".[30] Konrad Zweigert, lastly, went as far as suggesting a "*praesumptio similitudinis*" for comparative law.[31] Comparative law, it seems, has for long been characterised by an optimistic universalism, which was driven by a quest of the common ground of legal systems.[32]

This universalist view of legal systems contrasts strongly with the results of many detailed comparative studies and the practical experience with legal unification which has moved slowly outside the inner realm of contract law. For the field of security law I have demonstrated in another study[33] that unification efforts have so far been based mainly on the concept of recognition of foreign security interests ("*Anerkennungsmodell*") and that only recently under the auspices of UNIDROIT and UNCITRAL it has been attempted to draft conventions based on the concept of core provisions ("*Kernvorschriftsmodell*"). Both models introduce a mixture of rules dealing with conflict of laws and substantive law; however, where the concept of recognition is used rules of substantive law are extremely

---

[27] 4th ed. (Tübingen 1990).
[28] *Ibd.*, p. 381.
[29] Ernst Rabel, International Tribunals for Private Matters in The Arbitration Journal 1948, pp. 209-212 (212).
[30] Rudolf B. Schlesinger, The Common Core of Legal Systems. An Emerging Subject of Comparative Study in Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard (eds.), XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema (Leiden 1961), pp. 65 *et seq.*
[31] Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (translated by Tony Weir), 3nd ed. (Oxford 1998), 3 III = p. 40.
[32] For a general review of the universalist strands in the comparative tradition see Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34. The universalist strands in the comparative tradition can be found in the main historical phases of comparative law, i.e. (i) enlightenment, (ii) historicism, (iii) unificatory enthusiasm and (iv) functionalism.
[33] See Röver, Prinzipien, § 4 II = pp. 27-42.

limited. Unification of substantive law proper has only been undertaken on the basis of model provisions, e.g. the EBRD Model Law on Secured Transactions. This state of affairs cannot be explained by a surprising similarity of legal systems as claimed by the universalists but rather by the many differences between legal systems in their understanding of property law in general and security law in particular.

If one wants to make reference to principles in comparative law one, therefore, has to move away from the concept of "universal principles" as looked for by the universalists and one has to introduce a more modest concept of principles. In this concept, principles are only seen as analytical tools.[34] In an earlier study I introduced the concept of analytical, comparative principles which could form the basis for a principles method of comparative law.[35] Such principles should conform to four criteria:[36] they should be functional, positive, general and potentially universal.

First, a comparative legal principle must be **functional**. Comparative law is guided, on the one hand, by the general concept of equality ("allgemeiner Gleichheitssatz") according to which similar issues can only be compared with other similar issues.[37] On the other hand, comparative law builds on the expectation that certain solutions in different legal systems are functionally equivalent to each other. Functionality of a principle follows from it being the solution to a specific legal issue. The interpretation of a comparative principle being the solution to a legal problem is helpful with a view to avoid becoming too close to the structures of given legal systems. However, a legal issue and structures of given legal systems illuminate each other; they stand in a hermeneutic relationship. Therefore, a comparatist will often, for the purpose of defining a legal issue, hark back to the structures of given legal systems. Ultimately, comparative principles must be derived from legal

[34] E.g. the principles of unity and multiplicity (chapter 7.5.1 below) summarise the approach of various legal systems to delineate the scope of security interests.
[35] See Röver, Prinzipien, § 6 = pp. 79-96.
[36] Röver, Prinzipien, § 6 II = pp. 88-94.
[37] This is the traditional view introduced by John Stuart Mill which he held in his "A system of logic: ratiocinative and inductive, being a connected view of the principles of evidence and the methods of scientific investigation (1843) (= The Logic of the Moral Sciences [Chicago, LaSalle/Illinois 1994], p. 76), where under the subheading of the method of agreement he is in search for patterns of invariance; a different view is held by Charles C. Ragin, The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies (Berkeley, Los Angeles, London 1989); Charles C. Ragin, Fuzzy-Set Social Science (Chicago 2000), who rejects the concept of equality as the basis of comparison.

issues. By concentrating on legal issues a functional comparative principle focuses on specific legal systems and avoids equating the narrowly focussed, more specific rules of different legal systems. Hence, comparative principles must be neutral with respect to existing legal systems.

The response to a legal issue in the form of a comparative principle must follow from the legal system under consideration. It is in this sense that the comparative principle must be a **positive** one. This distinguishes the principles method of comparative law from the "universal, not structurally related, fundamental legal ideas" proposed by Josef Esser. Analytical, empirical comparative principles must be able to be tested against positive law.

The third criterion of comparative principles is their **generality**. A comparative principle is the more general the less specific the contents described by it is. The criterion of generality needs particular explanation since it is decisive for the notion of principles developed here. In order to explain the criterion of generality it is useful to go back to the purpose of the notion of comparative principles developed here. Comparative principles enable comparative law to conduct a broad analysis of foreign laws (a so-called macro-analysis) and thereby also enrich the method of legal reform by facilitating the transfer of comparative work into legislatory texts. It could be argued that both purposes can be equally achieved by a micro-comparison of details, i.e. by way of a rule-by-rule comparision. In addition, one can argue that the distinction between general and specific is difficult to make since it is a matter of degree only. To the argument that micro-comparison is a more adequate approach than macro-comparison it should be said that micro-comparison is surely a possible approach to comparative law. However, particularly with the micro-comparison of areas of law such as security law it can often be seen that the results cannot be translated into clear concepts. Often descriptions of different laws stand alongside each other; several aspects are then chosen for a comparison. The method of types developed by Drobnig, the method of legal families ("Rechtskreise") and the macro-comparison, respectively, result in overviews of legal phenomena only. A comparison of legal systems with the assistance of analytical principles is an approach which comes close to micro-comparison without loosing the advantages in clear description of the method of types. If the principles method is preferred to other methods of comparative law it should

be remembered that the various methods are distinguished by their different "focal lengths". They are all justified in their own way. Hence, methods of types point out on a general level and comparative principles on a more specific level which solution is chosen by a national legal system.

As far as the distinction between general and specific is concerned, it has to be recognised that principles can be created with various degrees of generality. E.g. the security principle concerns the fundamental distinction between secured debt and security interest, whilst the registration principle (providing for the registration requirement of certain types of security interests) is concerned only with the creation of a security interest. Ultimately, the comparatist has a great degree of freedom as far as the selection of principles is concerned.

The fourth characteristic of a comparative principle is its **universality**. Universality means that a principle describes a legal approach taken in more than one legal system, i.e. is related to an open class of legal systems. This characteristic is fundamentally different from the other characteristics. Whilst the characteristics of functionality, positivity and generality are necessary elements of a comparative principle, the characteristic of universality is only a potential one. A comparative study may show that a comparative principle can only be found in one single legal system but not in others. The universality of a comparative principle, therefore, turns out to be a working assumption which may have to be discarded at a later point in time. For example, the universality of the principle of abstraction in German property law is a working assumption which cannot be proved upon further examination.

Integrating the element of universality into the notion of the comparative principle bears the danger that the other principles loose their distinctiveness. On the other hand the process of creating principles is a new tool for comparative law. When formulating principles one will have to try to keep the distinctiveness of a principle as far as possible.[38] The task for the comparatist is ultimately to recognise **relevant** structures. However, the discovery of relevant structures is difficult. It can only succeed if the criteria for its definition are kept flexible. Principles allow the comparatist to design models of approximation.

The requirements of universality and functionality are in tension with each other. One the one hand the comparative principle shall be capable of describing properties of several legal systems. At the same time this description shall not contain structures of national legal systems. Legal problems as a starting point for comparative work mediate this tension to a certain extent; however, the tension does not disappear completely.

Two general issues of comparative law arise also in the context of the principles method: the selection of legal systems and the criterion of comparison. As far as the selection of legal systems is concerned those legal systems have to be chosen which promise to show typical characteristics. It is dependent on the purpose of a study what has to be considered as 'typical' in its context. When preparing legal reform it will often be important to highlight some very general principles to start the legal reform process. To deliniate the various possibilities on the basis of comparative law one will chose legal systems which are expected to produce widely differing solutions.

As far as the criterion of comparison is concerned the principles method relies on comparative principles which will be demonstrated in the following discussion of security law.[39] In this context the approach found in a certain legal system will be discussed. These approaches will subsequently be examined under the perspective of the principles method.

In this context it should be noted that the characterisation of a comparative principle developed in this study is close to the concept of a legal type ("*Typus*"). A type in the definition of Leenen is an "elastic group of requirements" ("*elastisches Merkmalsgefüge*").[40] Such a type is characterised by the variability and graduability of the individual requirements.[41] Further, both comparative principle and type are closely related to a "flexible system" ("*bewegliches System*") as defined by Walter Wilburg.[42]

---

[38] See the examples of general principles of security law in chapter 7.
[39] See parts III-IV.
[40] Detlef Leenen, Typus und Rechtsfindung (1971), p. 34.
[41] Karl Engisch, Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit (Heidelberg 1968), p. 242.
[42] See Karl Larenz and Claus-Wilhelm Canaris, Methodenlehre der Rechtswissenschaft, 3rd ed. (Berlin etc. 1995), p. 209; see also Claus-Wilhelm Canaris, Bewegliches System und Vertrauensschutz im

5 The economics of security

It was explained above that comparative law has three dimensions, an analytical, an empirical and a normative dimension. Comparative principles have both an analytical and an empirical function. They assist in understanding the notions and the system of local and foreign law as much as they describe foreign law. However, comparative law also has a normative (i.e. evaluative) dimension which is not yet served by comparative principles. The normative dimension is characterised by the normative measure used. In an earlier study I have shown that such measure can be seen in the economic functions of a legal concept such as security interests.[43] Hence, if we want to understand both the general mechanics of security law and to develop a perspective for legal reform in this area we are greatly assisted by reassuring ourselves of the economic rationale of security.

Richard Posner one of the proponents of the economic analysis of law[44] has distinguished a positive and a normative approach to economic analysis.[45] The positive role of economic analysis is to attempt "to explain legal rules and outcomes as they are" whereas its normative role is "to change them to make them better". We have some doubts as to the positive role of economic analysis but we recognise its normative role. Economic criteria can provide useful arguments for the evaluation of the effectiveness of legal rules and for their criticism on this basis.

Broadly we can distinguish the micro- and the macroeconomic functions of security. Microeconomics looks at economic effects on individual economic entities whereas macroeconomics is concerned with the economy as a whole.

5.1 Microeconomic functions of security

---

rechtsgeschäftlichen Verkehr in Franz Bydlinski, Heinz Krejci, Bernd Schilcher and Viktor Steininger (eds.), Das Bewegliche System im geltenden und künftigen Recht (Wien, New York 1986), pp. 103-16.

[43] See in more detail Jan-Hendrik Röver, Prinzipien, § 7 = pp. 97-128.

[44] See Richard Posner, Economic Analysis of Law, 4th ed. (Boston, Toronto, London 1992).

5.1.1 Risk reduction

Security's main economic function is to reduce the creditor's risk of giving credit. Any provision of credit involves a number of risks: over the life of the credit the value of the money extended can change within an economy because of inflation or deflation; also its value can change in relation to foreign currencies because of fluctuations in exchange rates. Furthermore the prices of credit, i.e. interest rates may vary. All these risks are independent from the repayment of a particular credit. Security will do nothing about them because it is only concerned about risks relating to the repayment of credits. Those risks can be twofold: they comprise the risk of a debtor either not repaying the creditor at the agreed time or of it not repaying at all. The repayment of credit has two main components: the principal amount and the price for the credit, i.e. its interest.

Every commercial investor is interested in making a profit from its investment but in many cases the first fundamental concern is to obtain protection against loss of the investment. A legal framework for security is a key requirement for creating an investor-friendly climate. An investor who knows that it has legally recognised rights to turn to its debtor's assets in case of non-payment may assess the investment risk quite differently. It may influence its decision whether to invest or not. It may also change the terms on which it is prepared to invest in four ways. It may lower the interest rate on a loan, it may increase the amount of a loan and it may extend the period for which the loan is granted. Lastly, it will also influence the relationship between debt and equity, i.e. the ratio between credit and investment, which the creditor is prepared to accept with the debtor. The economic value of security can be formulated in a simple rule which links the economic value to the risk reduction achieved by security: the more the risk of giving credit is reduced, the greater will be the value of security to the lender and the greater will be a security's microeconomic effect. There is a direct relationship between the legal framework and the attitude of the investor. If there is a law on secured transactions which is seen to give practical protection and remedies in the case of non-payment of a debt then security can become a major part of the investment decision, both for local and international investors. If the investor is not persuaded that the law gives real protection and remedies then it becomes irrelevant.

---

[45] *Ibid.*, § 2.2.

5.1.2 Prevention of risk shifting

Closely related to security's function of risk reduction is its purpose of preventing the debtor shifting risks to the detriment of creditors. Chris Higson has clearly named the risks facing a creditor once the credit contract has been signed:[46] the debtor "may issue more debt of equal or greater seniority; it may distribute as dividends or salaries assets the creditors were looking to as security; it may develop a more risky investment strategy, the benefit of which would be reaped by equity but the costs of which might be borne by debt." Economists see in the conflict between equity and debt-holders an example for the phenomenon of moral hazard. Equity-holders tend to reduce their own risks related to a project by increasing external financing and by increasing the riskiness of projects in the interest of return. Moral hazard faced by equity-holders contributes to the risk of non-payment of the debt by the debtor. Risk shifting can clearly be prevented by security which has the effect that the debtor is putting its assets at risk in the event of default with the secured debt.

5.1.3 Information about the debtor

A third purpose of security is to give the creditor information about the debtor's willingness to repay the credit. The economic argument was developed in the context of research into markets with incomplete and asymmetric information. George A. Akerlof demonstrated in his famous paper "The market for 'lemons'"[47] the phenomenon of adverse selection which he illustrated at the example of the market for used cars. The seller of a used car knows all its defects whereas the potential purchaser is uninformed about them. When prices are high, good and bad (so-called lemons) cars are on the market. With falling prices more and more better quality cars leave the market whereas bad quality cars remain; thus the probability of purchasing a bad car is increased. That leads to the astonishing effect that with falling price demand will not necessarily increase but may decrease. In the extreme there will not be any demand for cars at all.

---

[46] Business Finance 2nd ed. (London, Dublin, Edinburgh 1995), p. 233.

Although Adam Smith[48] did not know about the term 'adverse selection' he was fully aware of the underlying phenomenon:

> "The legal rate [of interest], it is to be observed, though it ought to be somewhat above, ought not to be much above the lowest market rate. If the legal rate of interest in Great Britain, for example, was fixed so high as eight or ten per cent., the greater part of the money which was to be lent, would be lent to prodigals and projectors, who alone would be willing to give this high interest. Sober people, who will give for the use of money no more than a part of what they are likely to make by the use of it, would not venture into the competition. A great part of the capital of the country would thus be kept out of the hands which were most likely to make a profitable and advantageous use of it, and thrown into those which were most likely to waste and destroy it. Where the legal rate of interest, on the contrary, is fixed but a very little above the lowest market rate, sober people are universally preferred, as borrowers, to prodigals and projectors. The person who lends money gets nearly as much interest from the former as he dares to take from the latter, and his money is much safer in the hands of the one set of people, than in those of the other. A great part of the capital of the country is thus thrown into the hands in which it is most likely to be employed with advantage."

In recent times Joseph Stiglitz and Andrew Weiss in particular demonstrated the effects of adverse selection in the context of credit and security.[49] A bank cannot tell whether a debtor is a serious entrepreneur or just a gambler. When interest rates increase the category of serious entrepreneurs becomes rarer in the pool of applicants for credit. Analogously to the situation described for used cars the profit of the bank may not increase with the interest rate but could decrease. Adverse selection leads to what economists call credit rationing.[50] It can be overcome by security. The serious entrepreneur will be willing to give security whereas the gambler prefers not to give security which it is most likely to lose. Applicants for credit, hence, order themselves into different classes of risk according to their willingness to give security.

5.2 Macroeconomic functions of security

---

[47] (1970) The market for "lemons": qualitative uncertainty and the market mechanism in 84 Quarterly Journal of Economics, pp. 488-500.

[48] An Inquiry into the Nature and Causes of the Wealth of Nations (ed. by R.H. Campbell, A.S. Skinner and W.B. Todd), vol. I (Oxford 1979), II.iv = p. 357.

[49] (1981) Credit rationing in markets with imperfect information in 71 American Economic Review, pp. 393-410.

5.2.1 Lending and investment

We have seen that the risk-reducing function of security has four important microeconomic side effects: security lowers the price of credit, increases the amount of credit available, extends the period for which credit is granted and influences the ratio between credit and investment, between debt and equity, in an individual project. These effects will be of great advantage to borrowers but do they matter for the economy as a whole? They do indeed, mainly because of three foremost macroeconomic effects which stem from security: it will make available a lower interest rate for secured credits generally, it will increase the amount of credit available in an economy and it will ultimately increase total investment and production.

Those qualitative effects have been quantified by the economist Heywood Fleisig when he compared credit markets in a number of South American economies with the United States' credit market.[51] He estimated for example for Bolivia a difference to US interest rates of 34% to 46% attributable to a less risk-reducing legal framework for security. Assuming the same credit costs would prevail in the United States and in Bolivia he forecasted an increase in the amount of capital available of between $752 million and $1,871 million. That would lead to an increase of production of between $230 million to $683 million or between 3% to 9% of gross national product! Those numbers should not be taken at face value; it is quite difficult to estimate the production potential of one economy by taking the data from another economy. They demonstrate, however, by order of magnitude the remarkable quantitative dimension of the macro economic contribution of security.

5.2.2 Allocation of resources

In a number of ways security plays a role in the efficient allocation of resources in an economy. Economists attribute an inefficient allocation of resources particularly to

---

[50] See Joseph E. Stiglitz, Economics (New York, London 1993), pp. 553-5.

[51] See his summary Economic Functions of Security in a Market Economy in Joseph Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1997), pp. 15-38.

transaction costs. The importance of transaction costs was brought to light by Ronald H. Coase.[52] It was, however, already Adam Smith who gave an example for the detrimental effects of transaction costs:[53]

> "But where the fees of registration have been made a source of revenue to the sovereign, register offices have commonly been multiplied without end, both for the deeds which ought to be registered, and for those which ought not. In France there are several different sorts of secret registers. This abuse, though not perhaps a necessary, it must be acknowledged, is a very natural effect of such taxes."

Security with its risk-reducing and information functions can lower the transaction costs and in particular the information costs of credit contracts. That facilitates the flow of financing and in turn an efficient allocation of production opportunities. Savings, capital and credit are allocated in an efficient way. It should, however, be noted that unnecessary transaction costs related to security can distort its positive effects as can be seen from Adam Smith's above mentioned example.

5.3 Critique of the economic discussion of security

It may have struck the reader that so far we have talked about 'security' in a very generic sense. The legal systems of the world, said to be now more than 300,[54] do however display a great variety of types of security. Some legal systems give the creditor wide rights such as English security law which permits the holder of a so-called 'floating charge' given by a company to appoint a receiver once the debtor is in default. The receiver is given the power to manage the debtor's company with a view to achieve satisfaction of the creditor.[54a] Other legal systems like French or German law do not contain the remedy of receivership. When one looks at the great diversity of types of security in national legal

---

[52] See his collection of essays The Firm, the Market, and the Law (Chicago, London 1990). See for the impact of transaction costs from a historical perspective Douglass C. North and Robert Paul Thomas, The Rise of the Western World. A New Economic History (Cambridge 1973).

[53] An Inquiry into the Nature and Causes of the Wealth of Nations (ed. by R.H. Campbell, A.S. Skinner and W.B. Todd), vol. II (Oxford 1979), V.ii.h = p. 863.

[54] See Philip R. Wood, Where Now in World Financial Law? in Butterworths Journal of International Banking and Financial Law 1995, p. 55; Philip R. Wood, Law and Practice of International Finance. Comparative Financial Law (London 1995), nos. 5-1 to 13-2.

[54a] Now limited by the Enterprise Act 2002; see chapter 6.3 below.

systems one becomes aware of how tentative the use of the word 'security' is. There is no such thing as a generally agreed notion of security rights.

Economists have rarely taken note of these differences. Much of the writing comes from American authors who equate security with the types of security found in American law. When talking about the economic functions of security we must keep this in mind. Not every type of security may fulfil the above mentioned functions, many may fall well short of them. The economic functions are normative measures for the economic effectiveness of security. They do not necessarily describe the law positively, to use Richard Posner's distinction.

6 Legal systems examined in this study

In the course of this study we shall discuss aspects of four legal systems: (1) the law of England and Wales, (2) US-American law, (3) German law and (4) the EBRD Model Law on Secured Transactions. Within these legal systems we will concentrate on security[55] and within this field on proprietary security interests.[56] Furthermore, we will focus on contractual security interests in order to limit our scope. Hence, security interests created by operation of law will not be covered (unless they arise from a security interest initially created by contract). Although our focus is limited, there will be plenty of material to cover.

6.1 Distinction as to basic legal models

The principles of unity and multiplicity underlie the general structure of national security laws.[57] Hence, a legal system can either provide for a multitude of different security interests or concentrate on a more or less limited number of security interests.

Furthermore, contractual proprietary security can be based upon three main basic legal models.[58] The possessory pledge of things, the non-possessory security right[59] and

[55] See the discussion of this concept in Jan-Hendrik Röver, Prinzipien, § 8 = pp. 130-6.
[56] See Jan-Hendrik Röver, Prinzipien, § 9 = pp. 137-58.

ownership[60]. It is not uncommon for legal systems which follow the principle of multiplicity to realise all three legal models. This is often the result of a security system comprising security interests which proved not practicable over time so that other security interests (notably those based on the notion of ownership) have then been added.

6.2 Distinction as to types of charged property

Many legal systems distinguish broadly between security rights over immovable property, over movable property and over rights. Particularly security over immovable property is provided as part of land law and is quite separate from security over movables. Regularly security over movables is treated differently from security over rights. Such distinctions in principle do not diminish the risk-reducing function of security because they do not interact with each other. As security creates a right in property only the rights in the same property can conflict with each other.

6.3 Security under the law of England and Wales

English law distinguishes four types of consensual security interests: the pledge, the contractual lien, the mortgage and the equitable charge.[61] The **pledge** is a possessory

---

[57] See Jan-Hendrik Röver, Prinzipien, § 12 = pp. 179-87.

[58] Doc. A/CN.9/131 and annex, "Study on security interests" and "Legal principles governing security interests (study prepared by Professor Ulrich Drobnig of Germany) in UNCITRAL Yearbook vol. VIII, 1977, part two, II, A), 2.1.2 = pp. 173-5.

[59] Called 'mortgage' by Ulrich Drobnig, *op.cit.*, p. 174.

[60] Respectively 'title' according to the underlying proprietary concepts; see chapter 11 below.

[61] For English security law see Andrew P. Bell, Modern Law of Personal Property in England and Wales (London, Edinburgh 1989); Michael Bridge, Personal Property Law, 2nd ed. (London 1996), pp. 141-61; Jan Hendrik Dalhuisen, Dalhuisen on International Commercial, Financial and Trade Law (Oxford, Portland/Oregon 2000), pp. 432-52, 625-38; Eilís Ferran, Company law and corporate finance (Oxford 1999), pp. 488-544; Roy Goode, Legal Problems of Credit and Security, 2nd ed. (London 1988); Roy Goode, Commercial Law, 2nd ed. (London 1995), Part Four = S. 635-744; Roy Goode, Proprietary Rights and Insolvency in Sales Transactions, 2nd ed. (London 1989); Roy Goode, Principles of Corporate Insolvency Law (London 1990); William James Gough, Company Charges, 2nd ed. (London etc. 1996); L.C.B. Gower, Gower's Principles of Modern Company Law, 5th ed. (London 1992); Anthony G. Guest and Eva Lomnicka, An Introduction to the Law of Credit and Security (London 1987); Lord Hailsman of St. Marylebone (ed.), Halsbury's Laws of England, 4th ed. Reissue (London 1973 ff.), vols. 3 (1), 6, 7 (2), 32; Kurt Lipstein, Introduction: Some Comparisons with English Law in Rolf Serick, Securities in Movables in German Law: An Outline (translated by Tony Weir) (Deventer, Boston 1990), pp. 1-14; Gerard McCormack, Reservation of Title (London 1990); Robert R. Pennington, Company Law, 7th ed. (London, Dublin, Edinburgh 1995); Robert R. Pennington, Corporate Insolvency Law (London, Dublin, Edinburgh 1991); E.L.G. Tyler, Fisher & Lightwood's Law of Mortgages, 11th ed. (London 1997).

security interest which can be created in goods as well as in documentary intangibles (i.e. documents of title and instruments embodying a money obligation). The creditor can take physical possession but it suffices if he holds constructive possession through another person. Surprisingly constructive possession can even be held through the debtor himself as the creditor's trustee-agent.[62] The pledgee has an implied power to sell the pledge property in the event of the debtor's default. Since possession is transferred there is no equitable pledge; the pledge is a legal interest.

The **contractual lien** is a contractual right of detention for goods having been delivered to the creditor for some other purpose than security (e.g. storage or repair). It provides only for a right of detention and not for a right of sale.

The third type of security interest under English law, the **mortgage**, is a transfer of title to the creditor by way of security, upon the express or implied condition that the asset shall be reconveyed to the debtor when the sum secured has been paid.[63] A delivery of possession is not incompatible with a mortgage, but it is not a legal requirement of its creation. The mortgage developed historically for land; today, however, security over land is taken either as (i) charge by way of legal mortgage[64] or (ii) as a demise for a term of years absolute. This leaves the mortgage as a security interest in chattels ("chattel mortgage"). The mortgage can be either a legal or an equitable mortgage. It can also be either a fixed or a floating mortgage.[65] Where the security is a written mortgage of goods by an **individual** it must in principle conform to the requirements of the Bills of Sale Acts. The security is sometimes called "security bill of sale".[66] Mortgages by a company require registration at the Companies Registry.

Lastly, the **equitable charge** is an encumbrance which constitutes the creditor's right to have a designated asset of the chargor appropriated to the discharge of the indebtedness.

---

[62] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 1 = p. 644, 24 2 (i) = p. 701.
[63] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 3 = p. 644, who, however, uses the word "ownership" instead of "title".
[64] Section 87 (1) Law of Property Act 1925.
[65] See Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 4 n. 59 = p. 646; 25 2 n. 6 = p. 732, 25 5 n. 48 = p. 740; the general term "floating charge" covers not only charges proper but also mortgages.
[66] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 3 = p. 645 footnote 57; 23 2 (i) 2 = p. 681 footnote 30.

Like mortgages equitable charges can be fixed or floating.[67] Since they are mere encumbrances they can only exist in equity (or by statute).[68]

It was already mentioned that in the realm of non-possessory security interests, i.e. equitable charges and mortgages, English law distinguishes between fixed and floating charges and mortgages[69]. Despite this confusing terminology the criterion to distinguish between both types of charges is not the way charged property is described but rather the chargor's power to sell the charged property. However, with respect to floating charges or mortgages the parties have great freedom in defining the charged property. A floating charge or mortgage can provide for a (partial) crystallisation over part of the assets so long as the property which is to be the subject of the partial crystallisation is clearly identifiable from the description in the security agreement.[70]

The Enterprise Act 2002 which received Royal Consent on 7 November 2002 introduced a number of significant changes to the legal regime of floating charges which ultimately weakened the position of creditor's protection by floating charges or mortgages. In principle, secured creditors lost their right to appoint an administrative receiver in respect of floating charges.[71] Exceptions to this rule are made for so-called "qualifying floating charges" (QFC) which may apply in the following circumstances: the transaction in the course of which a qualifying floating charge is created is (1) a capital markets arrangement,[72] (2) arising in the context of a private-public partnership project,[73] (3) arising

---

[67] For floating charges see Volker Triebel, Stephen Hodgson, Wolfgang Kellenter and Georg Müller, Englisches Handels- und Wirtschaftsrecht, 2nd ed. (Heidelberg 1995), § 4 VI = pp. 135-40; Ulrike Seif, Der Bestandsschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht (Tübingen 1997), pp. 102-38; Edzard ter Meulen, Die Floating Charge - ein Sicherungsrecht am Vermögen einer englischen Company. Ein rechtsvergleichender Beitrag zu den Problemen der Sicherungsübertragung (Frankfurt a.M., Berlin 1969); Manfred Wenckstern, Die englische Floating Charge im deutschen Internationalen Privatrecht in 1992 RabelsZ 56, pp. 624-95; although Scottish law is generally considered to be a civil law jurisdiction it nevertheless knows a floating charge; see George L. Gretton, Mixed Systems: Scotland in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1998), pp. 279-92.

[68] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 4 = p. 646.

[69] Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 = pp. 730-44; Roy Goode, Security Interests in Movables under English Law in Kreuzer (ed.), Mobiliarsicherheiten - Vielfalt oder Einheit? (Baden-Baden 1998), pp. 43-74 (57-9).

[70] Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 4 (i) 5 = p. 740.

[71] Secs. 250 Enterprise Act 2002, 72A Insolvency Act 1986.

[72] Secs. 250 Enterprise Act 2002, 72B Insolvency Act 1986.

in the context of a utility project,[74] (4) a project financing with a total debt amount of at least £ 50 million,[75] (5) is arising in the context of a financial markets transaction[76] or (6) pursued by a company which is registered as a social landlord.[77] Additional exceptions may be created by the Secretary of State by order.[78] The creditors losing the right to appoint an administrative receiver are now able to appoint an administrator; however, this will not require an application to court and obtaining a court order which was necessary previously. The company and its directors were equally given a right to appoint an administrator out of court (although only after giving prior notice to a holder of a floating charge who, if he wishes, is generally able to appoint an administrator of this own choice).

Even more fundamental is the second change made to the regime of floating charges under the Enterprise Act 2002. Pursuant to secs. 252 Enterprise Act 2002, 176A Insolvency Act 1986 a fund is made available out of realisations of assets subject to a floating charge, which is to be distributed to the unsecured creditors. This seriously limits the value of the floating charge although it has to be mentioned that the Crown has given up its status as a preferential creditor under the new rules of the Enterprise Act 2002[79] and that the amount of the fund is roughly equivalent to the average amount generally distributed to the Crown.

Further changes to English security law have been proposed by the Law Commission in a Consultation Paper.[80] The Consultation Paper argues (1) in favour of an eventual codification of the law governing security as well as (2) implementation of a new notice-filing system similar to that in existence under the UCC[81]. The proposed filing system would have as its basis a standard form on-line financing statement which, once completed, would appear automatically on the register; this would essentially reduce, if not completely remove, the role of Companies House in reviewing security filings. It should be pointed out

---

[73] Secs. 250 Enterprise Act 2002, 72C Insolvency Act 1986, mostly in the context of the UK Private Finance Initiative (PFI).
[74] Secs. 250 Enterprise Act 2002, 72D Insolvency Act 1986.
[75] Secs. 250 Enterprise Act 2002, 72E Insolvency Act 1986.
[76] Secs. 250 Enterprise Act 2002, 72F Insolvency Act 1986.
[77] Secs. 250 Enterprise Act 2002, 72G Insolvency Act 1986.
[78] Secs. 250 Enterprise Act 2002, 72H (2) (a) Insolvency Act 1986.
[79] See sec. 251 Enterprise Act 2002.
[80] The Law Commission, Consultation Paper No 164, Registration of Security Interests: Company Charges and Property Other Than Land (July 2002).
[81] See chapter 6.4 below.

that, based on the proposals made under the EBRD model law,[82] computer-based registration systems have been introduced successfully in Hungary and Slovakia. However, English commentators of the Law Commission's proposals have pointed out that the proposed reform might face considerable logistical hurdles in England. In any event the English law of security interests can be expected to be see significant changes in the near future.

Real security provides the chargeholder with a number of rights, in particular the right of pursuit, the right of preference, the right of retention or recovery of possession, the right of sale, the right of foreclosure, the right to ask for an order vesting legal title in the secured creditor.[83] In addition, the holder of a floating charge has the right to appoint an administrator or a receiver[84], as the case may be. However, the debtor has a right to redeem the security, a right which exists in equity (so-called equity of redemption) even after a legal right of redemption has terminated.[85]

A **trust** is no separate security under English law. However, equitable mortgages or equitable charges can be created by either contract or trust.[86] The pledge, the mortgage, the charge and a lien are mutually exclusive types of security.[87] Hence, a mortgage cannot at the same time be qualified as a charge.[88]

Although there are only four types of consensual security *stricto senso*, there are other legal institutions which on the basis of a functional analysis, create security for an obligation. For example, the **reservation of title or retention of title** (sometimes also referred to as "Romalpa clauses")[89] of a seller under a conditional sale agreement or the owner under a

---

[82] See chapter 6.6. below.
[83] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 6 = p. 673; 23 4 = pp. 689-92.
[84] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 4 = p. 689; 23 4 (iv) = pp. 692-3.
[85] There is in principle no equity of redemption in the context of a retention of title; Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (i) = pp. 642-3 footnote 43 = pp. 642-3.
[86] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (i) = p. 643, 22 (4) (ii) 4 = p. 646.
[87] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 9 = pp. 666 f.
[88] For trust receipts see Ulrich Drobnig, Das trust receipt als Sicherungsmittel im amerikanischen und englischen Recht in 1961 RabelsZ 26, pp. 401-66. It should be noted that there are no longer trust receipts under US-American law.
[89] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22.4 (i) = p. 642.

hire-purchase agreement, an import from continental laws,[90] is not qualified as security under English law since it is a right *in re sua*. Under a reservation of title title to goods is not to pass until their full price has been paid. Beyond this simple form of title reservation, the Romalpa case[91] demonstrated at least three forms in which a title reservation could be extended: (i) to all sums owing to the seller under prior or subsequent transactions ("all moneys' title retention clause"); (ii) to proceeds of authorised sub-sales by the buyer[92]; and (iii) to products made from the goods and other materials belonging to the buyer or a third party. A reservation of title is not registrable as a mortgage or charge e.g. in the Companies Registry.

Apart from the reservation of title the **assignment of receivables or book debts by way of security** is another form of functional security. An assignment can be either in the form of a legal assignment[93] or an equitable assignment.

6.4 Security interest under US-American law (Article 9 UCC)

As far as US-American law is concerned this study will concentrate on secured transactions in movables.[94] The law of secured transactions in movables has been unified in the United States by way of a model law, Article 9 Uniform Commercial Code (UCC).[95] Article 9 UCC covers so-called personal property security, i.e. security in movable things and some types of rights.[96]

---

[90] F.H. Lawson and Bernhard Rudden, Law of Property, 2nd ed. (Oxford 1982), pp. 203 f.; Eva-Maria Kieninger, Mobiliarsicherheiten im Europäischen Binnenmarkt. Zum Einfluß der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten (Baden-Baden 1996), pp. 83-92.

[91] Aluminium Industrie Vaassen B.V. v. Romalpa Aluminium Ltd [1976] 1 WLR 676.

[92] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 1 d = p. 655 holds that such an agreement creates a charge on the book debts arising from the sub-sales.

[93] Section 136 (1) Law of Property Act 1925.

[94] We leave security in immovables aside because this area of law has not yet been harmonised in the United States. Broadly immovable property security under American law is still based on the notions of English law and it, therefore, does not offer any particular insights.

[95] 'Uniform Commercial Code' is a misnomer from the point of view of a continental lawyer. First, it is not uniform since the states make specific changes to the UCC and adapt different versions of the code. Second, it largely does not codify commercial law in the continental understanding. Lastly, it is no act, but a mere model.

[96] For the US-American law of movable security see Ronald A. Anderson, Uniform Commercial Code (Rochester 1981 ff.); Ronald A. Anderson, Ivan Fox and David P. Twomey, Business Law and the Legal Environment (Cincinnati/Ohio 1993), chapter 35; Henry J. Bailey III and Richard B. Hagedorn, Secured Transactions in a Nutshell, 3rd ed. (St. Paul/Minn. 1988); Douglas G. Baird and Thomas H. Jackson, Cases,

Article 9 UCC is often seen by American lawyers as one of the great contributions of American private law in this century.[97] Comparative lawyers see it as an important reference system with a number of important features which clearly are conducive to secured financing. Although the original text of Article 9 UCC goes back to 1951[98] and was published as the "1952 Official Text" it has constantly been updated and has recently been reviewed again (1998 Revisions with 2001 Amendments).[99] What should be clear is that Article 9 UCC is itself not an applicable statute. Secured transactions law like contract law is state law and not federal law in the US. In order to introduce a great degree of uniformity between the various state laws in the area of secured transactions Article 9 UCC was prepared as a model law by the National Conference of Commissioners on Uniform State Laws and the American Law Institute. The first version of Article 9 UCC was drafted

---

Problems, and Materials on Security Interests in Personal Property (Mineola, New York 1984); Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf); Peter F. Coogan, William E. Hogan, Detlev F. Vagts and Julian B. McDonnell, Secured Transactions under the Uniform Commercial Code (New York) (loose-leaf); Jan Hendrik Dalhuisen, Dalhuisen on International Commercial, Financial and Trade Law (Oxford, Portland/Oregon 2000), pp. 432-42, 638-47; R.F. Duncan and W.H. Lyons, The Law and Practice on Secured Transactions: Working with Article 9 (New York 1989); Grant Gilmore, Security Interests in Personal Property, 2 vols. (Boston, Toronto 1965); Ray D. Henson, Secured Transactions under the Uniform Commercial Code, 2nd ed. (St. Paul/Minn. 1979); Julia Rakob, Ausländische Mobiliarsicherungsrechte im Inland (Heidelberg 2001); Stefan Riesenfeld, Introduction: Some Comparisons with American Law in Rolf Serick, Securities in Movables in German Law: An Outline (translated by Tony Weir) (Deventer, Boston 1990), pp. 15-20; UNCITRAL, Note by the Secretariat on article 9 of the Uniform Commercial Code of the United States of America in UNCITRAL Yearbook vol. VIII (1977), part 2, II, B = pp. 222-231; James J. White and Robert S. Summers, Uniform Commercial Code, 4th ed. (St. Paul/Minn. 1995); for the preparation of the 1998 revisions of Article 9 UCC see Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992).

[97] James White, Secured Lending in Market Economies: Law and Practice in Jonathan Bates, Lane Blumenfeld, David Fagelson, Vladimir Fedorov, Dmitry Labin, Jan-Hendrik M. Röver and John L. Simpson (eds.), International Conference on Secured Commercial Lending in the Commonwealth of Independent States (London, Maryland 1995), pp. 30-2 (30); Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992), p. 1.

[98] For the origin of Article 9 UCC see James White and Robert S. Summers, Uniform Commercial Code, 3rd ed. (St. Paul/Minn. 1988), § 1 = pp. 2-6.

[99] For the preparatory work see Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992). After nearly a decade of study and preparation, the National Conference of Commissioners on Uniform State Laws (NCCUSL) unanimously approved a final draft of Revised Article 9 of the Uniform Commercial Code in July 1998. This draft was forwarded to the state legislatures for implementation. The Drafting Committee for Revised Article 9 promoted a coordinated effective date of July 1, 2001. This goal was met with only four exceptions (Revised Article 9 was implemented on 1 January 2002 in Alabama, Florida and Mississippi and on 1 October 2001 in Connecticut).

foremost by Allison Dunham, Grant Gilmore and Karl Llewelyn.[100] It was intended for adoption by the states. By now all 50 states as well as the District of Columbia and the Virgin Islands have adopted Article 9 UCC[101] but the versions adopted are not identical in all respects.

There are a few features of Article 9 UCC which characterise the general thrust of the codification.[102] The single most important characteristic of Article 9 UCC is that it follows the principle of unity for security in movable property. There is only one type of personal

---

[100] James J. White and Robert S. Summers, Uniform Commercial Code, 4th ed. (St. Paul/Minn. 1995), § 21-1 = p. 715.

[101] The last state to adopt Article 9 UCC was **Louisiana** which implemented it with effect of 1 January 1990; for Louisiana's security law see Thomas A. Harrell, A Guide to the Provisions of Chapter Nine of Louisiana's Commercial Code in (1990) La. L. Rev. 50, pp. 711-96. - The American provisions have become a model for the security law in a number of **Canadian Provinces**. Article 9 UCC was not incorporated literally, but Canadian acts were prepared. Three different strands of development can be distinguished (for further details see Ronald C.C. Cuming and Roderick J. Wood, Saskatchewan and Manitoba Personal Property Security Acts Handbook, no place [Carswell Thomson Professional Publishing] 1994, pp. iv, 1-3). Initially the Province of Ontario prepared a Personal Property Security Act which followed Article 9 UCC closely and which came into force in 1967 (a new act was passed in 1990). The Canadian Bar Association built upon Ontario's work and drafted a model for a Personal Property Security Act, which was agreed in 1970; this model was used in 1973 by Manitoba, in 1980 by Saskatchewan and in 1986 by Yukon for the drafting of individual acts. In 1982 the Canadian Bar Association and the Uniform Law Conference passed a second model for a Personal Property Security Act. A third development derives from the Western Canada Personal Property Security Act Committee (latterly Canadian Conference on Personal Property Security Law), which presented a model based on Article 9 UCC, an the basis of which Alberta (1989), British Columbia (1989), Manitoba (1993), New Brunswick (1993), the Northwest Territories (1994) and Saskatchewan (1993) passed personal property security acts. Only a few Canadian Provinces remain without influence of Article 9 UCC. A Canadian version of English law is applied in Nova Scotia, Newfoundland and the Prince Edward Island and in Quebec security law has been incorporated in the new civil code which came into force on 1 January 1994 and which is largely independent from Article 9 UCC. - Proposals for the reform of security laws based on Article 9 UCC were made for **England** and **Wales** (Aubrey L. Diamond, A Review of Security Interests in Property [London 1989]; see also the earlier proposal by Roy Goode and L.C.B. Gower, Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction in Jacob S. Ziegel and William F. Foster (eds.), Aspects of Comparative Commercial Law: Sales, Consumer Credit, and Secured Transactions [Montreal, Dobbs Ferry/N.Y. 1969], pp. 298-349), **New Zealand** (Law Commission, Report No. 8: A Personal Property Securities Act for New Zealand [Wellington 1989]; a Draft Personal Property Securities Act is presented in this report), **Australia** (Australian Law Reform Commission, Report on Personal Property Securities [Sydney 1993]) and for **Latin American countries** (Alejandro M. Garro, Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform in [1987] Houston Journal of International Law 9, pp. 157-242; Alejandro M. Garro, The Reform and Harmonization of Personal Property Security Law in Latin America in [1990] Revista Juridica Universidad de Puerto Rico 59, pp. 1-155 [with a draft text of a model law for secured transactions which borrows from Article 9 UCC]). It was also used by American development organisation (like USAID and IRIS) for the reform of security laws in **central and eastern Europe**.

[102] See James White, Secured Lending in Market Economies: Law and Practice in Jonathan Bates, Lane Blumenfeld, David Fagelson, Vladimir Fedorov, Dmitry Labin, Jan-Hendrik M. Röver and John L. Simpson (eds.), International Conference on Secured Commercial Lending in the Commonwealth of Independent States (London, Maryland 1995), pp. 30-2.

security called 'security interest' irrespective of the type of asset that is taken as security.[103] § 1-201 (37) sentence 1 UCC contains the fundamental definition of a security interest: "'Security interest' means an interest in personal property or fixtures which secures payment or performance of an obligation'".[104] This concept of unity enables American law to greatly simplify the rules of security law. A second, directly related feature, is the exaltation of "substance over form" which is expressed in § 9-109 (a) UCC.[105] Any transaction with which the parties intend to create a security interest will be covered by the regime of Article 9 UCC. This means in particular that retention of title clauses, security transfers of title, financial leases and, in principle, assignments of receivables[106] all fall within the scope of Article 9 UCC. Article 9 has, therefore, been called an "octopus".[107] Albeit this approach does not extinguish the question whether or not a transaction is a secured transaction it greatly limits the danger of a circumvention of Article 9 UCC. This is of particular importance in view of the forth feature of Article 9 UCC, its reliance on the publicity of security interests. Third, we find that for the question whether or not a transaction falls under Article 9 UCC title is not relevant.[108] § 9-202 UCC expresses this concept which is a confirmation of the basic idea of the exaltation of substance over form. That title matters outside the scope of Article 9 UCC can be seen from § 2-401 (1) second sentence UCC. Where the parties have agreed a reservation of title clause the code expressly stipulates that title will pass despite the reservation.[109] The forth characteristic of Article 9 UCC is the prominence it gives to the publicity of security interests. The underlying concept is to give a diligent creditor the opportunity to find out which security

---

[103] For variations of this unity principle see Jan-Hendrik Röver, Prinzipien, § 12 III 1 = pp. 185-6.

[104] See the explanation in Grant Gilmore, Security Interests in Personal Property, vol. I (Boston, Toronto 1965), § 11.1 = pp. 333-7.

[105] Hence, Article 9 UCC is based on the principle of functionality.

[106] American law used to speak about "sales of accounts" but in most places of the UCC speaks now about "assignment" (see e.g. § 9-403 to § 9-406 UCC); there was, however, some uncertainty as to what constituted an account under both § 9-302 (1) (e) and § 9-104 (f) UCC (see James White and Robert S. Summers, Uniform Commercial Code, 3rd ed. [St. Paul/Minn. 1988] § 22-10 footnote 1 = pp. 1000-1). Exceptionally a sale of accounts was not covered by Article 9 UCC if it fell under § 9-104 (f) UCC old version. § 1-109 (a) UCC new version now includes sales of accounts in principle with the exception e.g. of assignments of claims for wages (see § 9-109 (d) (3)-(9) UCC new version).

[107] Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 1.03.

[108] US-American law of secured transactions, therefore, takes a neutral position between the principles of security in own property and in property held by another person (Jan-Hendrik Röver, Prinzipien, § 10 III 1 = p. 168).

[109] See § 2-401 (1) second sentence UCC: "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."

interests have previously been created in an asset. This gives the creditor an excellent tool for risk-evaluation. Article 9 UCC establishes a filing system which gives real meaning to the demand of publicity. Fifth, the publicity of security interests allows Article 9 UCC to determine priorities between different interests in principle according to their time of creation and to have a simple tool of ascertaining the time of creation. Sixth, in enforcement proceedings there is in principle no intervention of a court in enforcement proceedings. The creditor is entitled to self-help repossession and to a private sale of the property taken as security.

It should be noted that under US-American law there is no such thing as an English floating charge which can even cover most assets of an enterprise. However, US-American law recognises a floating lien which is a means of taking security in accounts, inventory and equipment under Article 9 UCC.[110]

6.5 Security under German law

German security law is characterised by the principle of multiplicity. In principle, there are different types of security rights for each type of asset. In addition, there are limited security rights as well as types of security based on the notion of ownership.

The first group of security rights in **movables**, i.e. movable things and rights, are security rights proper. German law provides for the pledge ("*Pfandrecht*") in movable things ("*bewegliche Sachen*", §§ 1204-1258 BGB), a pledge in receivables[111] ("*Forderungen*", §§ 1273, 1279-1290 BGB) and a pledge in other rights ("*anderen Rechten*", §§ 1273-1278, 1291-1296 BGB). Other rights include rights arising from negotiable instruments ("*Wertpapiere*")[112]. Rarely used in practice is the *usufructus* by way of security ("*Nießbrauch*") in movable things (§§ 1030-1067 BGB), in rights (§§ 1068-1084 BGB) or an estate ("*Vermögen*", §§ 1085-1089 BGB). However, noteworthy is that the *usufructus* can be used to take security over an estate which is otherwise impossible under German

[110] For details see Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 10 and chapter 12.2.2.1.4 below.
[111] 'Choses in action' in English law terminology.

law. The normal *usufructus* becomes a security right by adding to the *in rem* agreement creating the proprietary right a security agreement which is a contract between the person giving the *usufructus* and the person receiving it; this contract creates rights *in personam* between the parties.

The second group of security in movables is based on the notion of ownership (or holdership as far as rights are concerned). The law itself provides for the retention of ownership or title[113] where goods are sold (§ 455 BGB).[114] The retention of ownership is a transfer of ownership under the condition precedent (§ 158 [1] BGB) that the sales price is paid. This simple form of retention of ownership ("*einfacher Eigentumsvorbehalt*") was further developed by practice and legal doctrine which, in particular, added the types of a retention of ownership extended to other debts ("*erweiterter Eigentumsvorbehalt*") and a retention of ownership extended to future property ("*verlängerter Eigentumsvorbehalt*"). A retention of ownership extended to other debts extends the secured debt. Whereas under a simple form of retention of ownership only the obligation to pay the sales price triggers the transfer of ownership under the condition precedent, the extended retention of ownership clause extends the trigger to additional debts. In effect the same collateral provides security for several different debts. The retention of ownership extended to future property provides that in the case the purchased good is sold prior to payment of the purchase price the purchase price owed under the second sale is assigned to the initial seller ("*Vorausabtretung*"). The retention of ownership extended to future property is thus, in the terminology of English law, a limited tracing by way of agreement. Retention to ownership clauses extended to other debts and retention of ownership clauses extended to future property can be combined with each other ("*Klauselkombination*").

Curiously the retention of ownership creates for the person purchasing the goods a so-called expectancy right ("*Anwartschaftsrecht*"). Whilst the purchaser does not hold full ownership in the goods purchased the expectancy right is a right *in rem* which can be

---

[112] Not in the narrow sense of English law (where transfer of the document transfers the obligations to pay) but in the wider sense of "securities".

[113] For the purposes of German law it is more correct to refer to a retention of "ownership" because German does not know the distinction between title and interest; Jan-Hendrik Röver, Prinzipien, § 9 II 3 b = pp. 142-3.

[114] Note that under German law a sales contract creates only rights *in personam* between the parties. The transfer of title has to be effected by a separate contract in combination with the required publicity.

transferred separately to third parties. Third parties can even acquire this expectancy right in good faith (by way of analogy to §§ 929-935 BGB).

The second type of security in movables based on the notion of ownership is the security transfer of ownership ("*Sicherungsübertragung*"). It was developed by practice and legal doctrine because the limitations of the pledge (which is strictly possessory where movable things are concerned, and where there is a need to notify third parties where choses in action are concerned) and the retention of ownership (its primary purpose is to secure payment obligations in sales transactions) proved to be impractical. The security transfer exists in three types: the security transfer of ownership in movable things ("*Sicherungsübereignung*"), the security assignment of receivables ("*Sicherungsabtretung*" or "*Sicherungszession*") and the security transfer of other rights ("*Sicherungsübertragung sonstiger Rechte*"). All these types of security transfers are *in rem* a full transfer of a right to a new owner or holder. These transfers follow the respective rules of a transfer of the type of asset in question.[115] However, whilst the new owner or holder of the asset is not limited in any way *in rem*, he is limited by way of a separate security agreement ("*Sicherungsabrede*") between the parties. According to this agreement the new owner or holder of the asset may sell it only for security purposes, i.e. to recover his debt in case of a default. The security transfer is a form of trust ("*Treuhand*") under German law which is associated, different from its English equivalent, with no rights *in rem* but is based only upon obligations between the parties. Similar to the situation with retention of ownership clauses the security transfer can take three forms: it can be a simple security transfer, a security transfer extended to other debts and a security transfer extended to future property

Lastly, from a functional perspective security in movable assets is also provided by factoring and financial leasing transactions which are both recognised under German law.

Security rights in **immovables**, i.e. immovable things, are limited to limited security rights proper. The security transfer of ownership in immovables, although legally possible, is of no importance in practice for two reasons. The obligation to transfer ownership in real

estate has to be notarised pursuant to § 313 BGB which is costly. In addition, the transfer of ownership in real estate *in rem* is subject to a real estate purchase tax ("*Grunderwerbssteuer*").[116]

The security right used most often in practice is the non-accessory land mortgage by way of security ("*Sicherungsgrundschuld*") (§§ 1191, 1113-1190 BGB). This security right can, in principle, exist without a secured debt - this is why it is termed 'non-accessory'. Hence, even if a secured debt has been paid or performed in another way the non-accessory land mortgage continues to exist. It can, therefore, be used for several borrowings. However, the non-accessory land mortgage by way of security is accompanied by a security agreement tying the security right to a specific secured debt and defining the parties' rights and obligations. This non-accessory land mortgage is another example for a trust ("*Treuhand*") under German law.

The German civil code provides for the non-accessory land mortgage (§ 1191 BGB with a reference to the provisions on the accessory land mortgage, §§ 1113-1190 BGB) but does not refer to the security agreement coming with it. It, therefore, provides only for the simple non-accessory land mortgage ("*einfache Grundschuld*"). Another security right in real estate is the accessory land mortgage ("*Hypothek*", §§ 1113-1190 BGB). The German civil code provides numerous provisions on the accessory land mortgage and thereby indicates that it saw this security right to be the practically most important one for real estate.[117] Practice has, however, developed differently and made the non-accessory land mortgage by way of security the most important security right in real estate. Lastly, the non-accessory land mortgage cannot only secure a single debt but also the payment of recurring payments (non-accessory annuity land mortgage, "*Renten[grund-]schuld*") (§§ 1199-1203 BGB). Again, this type of security right is not often found in practice.

---

[115] Security transfer of ownership: § 929 first sentence and § 930 or § 929 first sentence and § 931 BGB; security assignment: § 398 BGB; security transfer of other rights: § 413 BGB in connection with the relevant provisions.

[116] See also Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 1 I 2 a = pp. 24 f.

[117] The legislator also provided that the non-accessory mortgage is the security right which has to be used in a procedural context. If a claim is enforced against real estate the creditor can ask the land register to register an enforcement mortgage ("*Zwangshypothek*", §§ 866-868 ZPO, 1184 f. BGB). Also an enforcing creditor can ask to register an injunctive mortgage ("*Arresthypothek*", § §§ 932 ZPO, 1184 f. BGB).

Another security right which is at the same time a trust under German law (because of the contents of the security agreement accompanying it) is the *usufructus* by way of security in real estate (*"Nießbrauch an unbeweglichen Sachen"*, §§ 1030-1067 BGB). The *usufructus* by way of security in an estate (§§ 1085-1089) can also extend to immovables. Both security rights are rarely seen in practice.

6.6 Security under the EBRD Model Law on Secured Transactions[118]

6.6.1 The EBRD

The European Bank for Reconstruction and Development is an international organisation formed to assist central and eastern European countries in their transition from centrally administered to market-oriented economies.[119] Three billion ECU of the original authorised capital stock of ten billion ECU were paid in by the members and a further seven billion ECU were committed as callable shares.[120] In addition, the Bank was given the power to borrow in national and international capital markets.[121] The capital stock originally authorised was increased by another ten billion ECU by a decision of the Bank's Board of Governors in April 1996.[122] The Bank's capital resources are to be used to foster private sector development by loans or guarantees to and equity investments in enterprises and the financing of public sector infrastructure projects.[123] Its charter puts special

---

[118] Andre Newburg, Legal Assistance in Eastern Europe: The EBRD's Model Law on Secured Transactions in: Albrecht Weber with Ludwig Gramlich, Ulrich Häde, Franz Zehetner (eds.), Währung und Wirtschaft. Das Geld im Recht. Festschrift für Hugo J. Hahn zum 70. Geburtstag (Baden-Baden 1997), pp. 441-46; Jan-Hendrik Röver, An Approach to Legal Reform in Central and Eastern Europe: The European Bank's Model Law on Secured Transactions in (1998/99) European Journal of Law Reform vol. 1, pp. 119-35; John Simpson and Jan-Hendrik Röver, An Introduction to the European Bank's Model Law on Secured Transactions, in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Marktes and the Role of International Financial Organisations (London, The Hague, Boston 1996), pp. 165-70.

[119] See art. 1 of the Agreement Establishing the European Bank for Reconstruction and Development, signed in Paris on 29 May 1990; the English text of the Agreement is printed in Ibrahim F.I. Shihata, The European Bank for Reconstruction and Development. A Comparative Analysis of the Constituent Agreement (London, Dordrecht, Boston 1990), pp. 109-63. The French, German and Russian texts are equally authentic (see art. 63 [3] second sentence of the Agreement Establishing the European Bank for Reconstruction and Development).

[120] For details see arts. 4-6 of the Agreement Establishing the European Bank for Reconstruction and Development.

[121] Art. 20 (1) no. 1 of the Agreement Establishing the European Bank for Reconstruction and Development.

[122] Resolution of the Board of Governors No. 59 of 15 April 1996.

[123] Arts. 2 and 11 of the Agreement Establishing the European Bank for Reconstruction and Development.

emphasis on the Bank's private sector activities because it requires the Bank to lend and invest at least 60% of its capital in the private sector.[124] In this respect the Bank is, however, able to invest in projects which are state sector projects initially and become private sector projects subsequently by way of privatisation of the project company.[125] Special funds provided to the Bank by its members are used i.a. for a Nuclear Safety Account[126] and so-called technical assistance projects. Projects assisting central and eastern European countries in their legal reforms such as the project to draft a model law on secured transactions are technical assistance projects.[127]

6.6.2 History of legal reform

The history of the relationship between law reform and the development of economic systems is largely a desiderate of the future.[128] It is possible, however, to mention a few pertinent aspects.

The direct link between law and economic development is not a new discovery. It was the founder of modern economic thinking, Adam Smith,[129] who clearly formulated the need for an adequate legal framework for a prosperous economic development. For him the relationship was natural. He taught not only economics but also ethics[130] and law[131] at the University of Edinburgh. In the 20th century Max Weber and Walter Eucken, in particular, discussed the relationship between law and macroeconomics. Max Weber devoted a whole chapter in his monumental work 'Economy and Society'[132] to the sociology of law. He underlined how important the foreseeability of law is for economic activity.[133] Walter

---

[124] Art. 11 (3) (i), (ii) of the Agreement Establishing the European Bank for Reconstruction and Development.
[125] The whole project is qualified as a private sector project; see Art. 11 (3) (iii) of the Agreement Establishing the European Bank for Reconstruction and Development.
[126] Andre Newburg, The Nuclear Safety Account in Law in Transition Autumn 1995, pp. 7-8.
[127] See generally Andre Newburg, Some Reflections on the Role of Law in the Transition Process in (August 1995) International Practitioner's Notebook, Nos. 58 and 59, pp. 22-4.
[128] See for early developments Douglass C. North and Robert Paul Thomas, The Rise of the Western World. A New Economic History (Cambridge 1973).
[129] See John Kenneth Galbraith, Economics in Perspective. A Critical History (Boston 1987); Robert Heilbronner, Worldly Philosophers. The Lives, Times and Ideas of the Great Economic Thinkers, 6th ed. (London 1991).
[130] Adam Smith, Theory of Moral Sentiments (D.D. Raphael and A.L. Macfie [eds.]) (Oxford 1978).
[131] Adam Smith, Lectures on Jurisprudence (R.L. Meek, D.D. Raphael and P.G. Stein [eds.]) (Oxford 1978).
[132] Max Weber, Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie, 5th ed. (Tübingen 1972).
[133] *Supra*, at pp. 184, 195-8.

Eucken, member of the Freiburg School of economists and one of the most important economic thinkers for the West German post-war economic system,[134] formulated the relationship even more explicitly: he recognised several legal institutions such as property and liability as constitutive elements of a market economy.[135]

At the end of the 19th and the beginning of the 20th century there were a few important examples of what I would call the 'adoption model of legal reform': reforming countries which adopted foreign laws more or less wholesale. In Japan the 1868 Meiji Restoration began a period of 20 years of institutional modernisation. It resulted in the adoption of a number of foreign codes initially French influenced. At a later stage the French models were replaced by German acts, notably the German commercial and penal codes. Kemal Atatürk's Turkey also attempted to support economic progress by adopting foreign laws, for example the Swiss civil code.

The use of legal reform as an active and deliberate tool for economic development re-emerged as part of the 'law and development programmes' in the 1960s. The whole concept of development of so-called 'developing' countries had appeared in the 1950s and came to be seen as an important task for the so-called 'developed' countries,[136] many of which were former colonial powers. The 'law and development programmes' went through various phases each of which was characterised by a different emphasis. A first phase lasted from the early 1960s to the mid-1970s. During this phase aid agencies financed many legal technical assistance projects in Africa, Asia and Latin-America. For example, foreign legal advisors were sent to developing countries and assisted governments with economic law reforms. It was assumed that legal change would lead to legal systems in developing countries largely similar to those in western developed countries. This assumption seemed to be rational because many legal systems in the now developing countries were based upon civilian or common law systems inherited from the colonial era. However, progress was slow and results often remained intangible because legal reforms were pursued in countries

[134] David J. Gerber, Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the New Europe in (1994) AJCL XLII, pp. 25-84; Andreas Heinemann, Die Freiburger Schule und ihre geistigen Wurzeln (Munich 1989).
[135] Walter Eucken, Grundsätze der Wirtschaftspolitik, 6th ed. (Tübingen 1990).
[136] Guy Feuer and Hervé Cassan, Droit international du développement, 2nd ed. (Paris 1991).

not committed to market economy and pluralistic political systems. As a consequence, by the mid-1970s, funding for many legal assistance projects had almost ceased.

The 'law and development movement' received a new impetus in the 1970s by what a USAID study[137] has called the 'New Directions Mandate'. During this second phase donors focused on the specific needs of the poor. It sought to alleviate poverty and comprised such diverse efforts as improving access to justice and legal literacy as well as activities in the area of human rights. In the 1980s a third phase of the law and development movement was geared towards issues of administration of justice. Various projects attempted to strengthen court procedures, i.e. the enforcement of rights. Both the activities of the second and the third phase of the law and development movement remained largely invisible.

The break-up of the former communist bloc marked a significant change. Legal technical assistance increased dramatically since, in central and eastern Europe, wholesale revamping of legal systems was seen as part and parcel of the transition from state-planned economies to market-oriented economies. Hence, in the 1990s legal reform became an integral part of policy advice, not only of the technical assistance programmes run by many individual countries but also of international organisations. Legal and economic transition in central and eastern Europe coincided with a growing recognition of the private sector as an active player notably in the area of infrastructure investments; it was acknowledged that private sector activity necessarily requires a predictable legal framework.[137a]

In the 1990s legal reform as a tool of economic reform was, however, not restricted to countries of the former communist bloc but became a global phenomenon. The World Bank[138] and the Asian Development Bank, in particular, ran comprehensive legal reform programmes in their respective member countries. In recent years there seems also to have taken place a shift in the reform tools. It now seems to be recognised that there are no

---

[137] Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs (Washington DC 1994).

[137a] Thomas W. Waelde and James L. Gunderson, Legislative Reforms in Transition Economies: Western Transplants – A short cut to Social Market Economy Status in 1994 ICLQ 43, p. 345.

[138] World Bank Legal Department, The World Bank and Legal Technical Assistance. Initial Lessons, Policy Research Working Paper 1414 (Washington DC 1995); Andrew N. Vorkink, The World Bank and Legal Technical Assistance. Current Issues (Washington DC 1997).

universalist solutions to the improvement of legal frameworks; the transplantation of western legal models without regard to local circumstance is seen as counter-productive. An illustration of this trend is given by the charter of the EBRD which requires the Bank to lend and invest at least 60 per cent of its capital in the private sector.[139] The 'adoption model of legal reform' has, therefore, been supplanted by a 'choice model of legal reform' in which the ultimate choices are made by national decision makers.

6.6.3 History of the Model Law on Secured Transactions

The European Bank for Reconstruction and Development must operate, like other investors in central and eastern Europe, in an uncertain legal environment. The legal foundations of democratic institutions and a market economy existed only to a minor extent in the formerly communist countries of eastern Europe. Not only contract law, property law and the law of commercial transactions had been neglected for a long time: also company law, competition law, financial and insolvency law did not meet the requirements of a modern market economy if they existed at all. The lack of practical and practised laws on secured transactions in central and eastern European countries at the time of the fall of the Berlin wall was particularly noteworthy. Some of the countries had fundamental provisions in their civil and commercial codes whereas other countries found almost no provisions in their legal texts.[140]

Since September 1992 the European Bank worked on a regional technical assistance programme aiming at the preparation of a model law on secured transactions.[141] The purpose of this model law is to support central and eastern European countries in the reforms of their secured transactions laws. A round table discussion on "Economic Law Reform: Creditor's Rights and Secured Transactions in Central and Eastern Europe" at the first meeting of the European Bank's Board of Governors April 1992 in Budapest stated

---

[139] Art. 11 (3) (i), (ii) of the Agreement Establishing the Bank for Reconstruction and Development.

[140] For an overview of reforms of secured transactions laws in central and eastern Europe see Wim Timmermans, Survey of Legislation on Secured Transactions in Central and Eastern Europe in International Bar Association Eastern European Forum Newsletter Summer 1994, pp. 10-1.

[141] For the genesis of the model law see also John Simpson and Jan-Hendrik Röver, Introduction in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994), p. v; Secured Transactions Project in Law in Transition Winter 1992/93, p. 4; The EBRD's Secured Transactions Project in Law in Transition Autumn 1993, p. 6.

that there was a lack of adequate security rights across the region and that, therefore, the central and eastern European secured transactions laws had to be reformed.[142] In particular Petar Sarcevic from Croatia and Stanislaw Soltysinski from Poland drew the conclusion that the need for modern secured transactions laws may best be addressed by way of developing a model law. Soon it was decided that this brief should be taken up by the European Bank.

The idea of producing a model law on secured transactions had already been pursued in the 70s and early 80s by the United National Conference on International Trade Law (UNCITRAL) (albeit its effort was limited to movable property). The most significant result at the time was a comparative report produced by Ulrich Drobnig.[143] The project was, however, halted because the differences between various security regimes around the world were deemed to be too great to draft a model law which would bridge differences in particular between common and civil law jurisdictions. Although UNIDROIT has recently contemplated to prepare a model law on secured transactions,[144] there is not yet a usable model text for security interests which mediates between different legal systems. When the European Bank started its work there was, therefore, no international model law to draw upon.[145]

From the very beginning the Bank involved in the project lawyers from central and eastern Europe. Soon after the meeting of the Bank's Board of Governors an international Advisory Board was formed. This Board comprised twenty leading academics and practitioners of secured transactions law, both from reform countries and established market economies.[146] This Advisory Board has greatly influenced the project by commenting on drafts of the model law and by taking part in a public discussion in April 1993 at the second Bank's

[142] A Regional Approach to Secured Transactions in Law in Transition Autumn 1992, p. 3.
[143] Legal principles governing security interests (document A/CN.9/131 and annex) in UNCITRAL Yearbook, vol. VIII (1977), part 2, II, A = pp. 171-221.
[144] UNIDROIT, 1993, Study LXXII-Doc. 7, para. 15; UNIDROIT 1993, Report on the 72nd Session of the Governing Council (c) International Aspects of security interests in mobile equipment); UNIDROIT, 1994, Study LXXII-Doc. 12, para. 8; John Simpson and Jan-Hendrik Röver, Comments on the UNIDROIT project for drawing up a check list of the issues to be addressed in a possible future model law in the general field of secured transactions, UNIDROIT, 1994, Study LXXIIA-Doc. 3.
[145] For an overview of the various efforts to reform secured transactions law by way of international or supranational instruments see Röver, Prinzipien, § 4 II.

Meeting of the Board of Governors in London. The text of the model law was drafted by a two man team with experience in both continental and Anglo-American legal systems.[147] An initial discussion paper,[148] a first[149] and a second working draft[150] were submitted and in April 1994. The final draft[151] was presented at the Bank's third Meeting of the Board of

---

[146] For a list of the Adviory Board members see European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994), pp. viii-ix.

[147] The members of the drafting team were John L. Simpson and Jan-Hendrik M. Röver.

[148] John Simpson and Jan-Hendrik Röver, Law on Secured Transactions - Discussion Paper, 10 December 1992.

[149] See Ulrich Drobnig, First working draft of the Model Law on Security Rights for Eastern Europe in Law in Transition Autumn 1993, pp. 7-9.

[150] See John Simpson and Jan-Hendrik Röver, Second working draft of the Model Law in Law in Transition Autumn 1993, pp. 10-1.

[151] For the text see Annex 1; see also the articles by John L. Simpson and Jan-Hendrik M. Röver, John A. Spanogle, Karl F. Kreuzer und Attila Harmathy in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998) and: Takashi Akahane, The EBRD's Model Law on Secured Transactions: new developments in Law in Transition Autumn/Winter 1997, S. 12; Barthold Albrecht, Transformation durch Partizipation. Die Bedeutung alternativer Privatisierungsmethoden für den Erfolg der Reformen in Osteuropa (Frankfurt a.M., New York 1996), pp. 185-7; Barthold Albrecht, Privatization, Coordination and Agency Costs: The Case for Participation in Eastern Europe in 1996 International Tax and Public Finance 3, pp. 351-68 (363 f.); Jonathan Bates, EBRD's model law on secured transactions in Project Finance International 4 August 1994, pp. 36-8; Jonathan Bates, EBRD's Model law on secured transactions and the reform process in The Moscow letter January 1995, pp. 114-6; Judit Bókai and Orsolya Erdôs Szeibert, Die Mobiliarhypothek und deren Register in Bundesnotarkammer (ed.), Festschrift für Helmut Schippel zum 65. Geburtstag (München 1996), pp. 843-67 (853, 866 f.); Carsten Dageförde, Das besitzlose Mobiliarpfandrecht nach dem Modellgesetz für Sicherungsgeschäfte der Europäischen Bank für Wiederaufbau und Entwicklung (EBRD Model Law on Secured Transactions) in 1998 ZEuP, pp. 686-700; Frédérique Dahan and Gerard McCormack, Secured Transactions in Countries in Transition (The Case of Poland): From Model to Assessment in 1999 European Business Law Review, p. 85; Frédérique Dahan and Gerard McCormack, International Influences and the Polish Law on Secured Transactions: Harmonisation, Unification or What? in Uniform Law Review 2002-3, pp. 713-36; Aniela Dowmunt-Iwaszkiewicz, Juliette Roggeman and Karen Wasserman, Un nouveau droit des sûretés pour les pays d'Europe de l'est. La loi-modèle sur les sûretés de la Banque Européenne pour la Reconstruction et le Développement (BERD), 2 vols. (diss. Paris I Pantheon-Sorbonne 1995); Duncan Fairgrieve, Reforming Secured Transactions Laws in Central and Eastern Europe in 1998 European Business Law Review, p. 245; Dietrich Firnhaber, Grund und Bedingungen eines einheitlichen Mobiliarsicherungsrechtes in Europa (unpublished draft diss. Paper Darmstadt 1999), chapter VII; István Gárdos and Ilona Bánhegyi, EBRD-zálogjogmodell in Bank & Tözsde of 7 March 1993, p. 19; Christian Gavalda, L'assemblée du Conseil des Gouverneurs de la B.E.R.D. Un Modèle de loi uniform sur les sûretés des conventions passées avec les pays de l'est élaboré par l'Office du Conseil Général de la B.E.R.D. Révision de Saint-Pétersbourg des 15 au 19 Avril 1994 in Les Petites Affiches of 8 June 1994, pp. 6-10; Eva-Maria Kieninger, Mobiliarsicherheiten im Europäischen Binnenmarkt. Zum Einfluß der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten (Baden-Baden 1996), pp. 219-21; Vladislav A. Kouvshinov, EBRD Model Law on Secured Transactions and Russian Federation Legislation on Pledge and Mortgage (paper given at the seminar "Current Trends in the Modernisation of the Law Governing Personal Property Security" held by UNIDROIT and the International Bar Association on 28 November 1994 in Rome; unpublished); Gerard McCormack and Frédérique Dahan, The EBRD Model Law on Secured Transactions: Comparisons and Convergence in 1998 Company, Financial and Insolvency Law Review, p. 65; Loukas Mistelis, The EBRD Model Law on Secured Transactions and Its Impact on Collateral Law Reform in Central and Eastern Europe and the former Soviet Union in 1998 Parker School Journal of East European Law 5, p. 455; Andre Newburg, Some Reflections on the Role of Law in the Transition Process in International Practitioner's Notebook Nos. 58 & 59 (1995), S. 22-4; Andre Newburg, Legal Assistance in Eastern Europe: The EBRD's Model Law on Secured Transactions in Albrecht Weber in

Governors in St. Petersburg[152] after consultations with both the members of the Advisory Board and also a large number of other interested parties. In 1997 the model law was complemented by the European Bank by "core principles for a secured transactions law".[153]

6.6.4 The notion and functions of the model law

6.6.4.1 Need for implementation

---

co-operation with Ludwig Gramlich, Ulrich Häde, Franz Zehetner (eds.), Währung und Wirtschaft. Das Geld im Recht. Festschrift für Hugo J. Hahn zum 70. Geburtstag (Baden-Baden 1997), pp. 441-6; Robert Rice, Clearing the way for capital in Financial Times of 14 June 1994, p. 20; Thilo Rott, Vereinheitlichung des Rechts der Mobiliarsicherheiten. Möglichkeiten und Grenzen im Kollisions-, Europa-, Sach- und Vollstreckungsrecht unter Berücksichtigung des US-amerikanischen Systems der Kreditsicherheiten (Tübingen 2000), pp. 92-112; Jan-Hendrik Röver, Security in central and eastern Europe and the EBRD's Model Law on Secured Transactions in Law in Transition Autumn 1994, pp. 10-4 (12-3); Jan-Hendrik Röver, The Model Law on Secured Transactions Prepared by the European Bank for Reconstruction and Development for the Countries of Central and Eastern Europe and the Commonwealth of Independent States (paper given at the seminar "Current Trends in the Modernisation of the Law Governing Personal Property Security" held by UNIDROIT and the International Bar Association on 28 November 1994 in Rome; unpublished); Jan-Hendrik Röver, Das EBWE-Modellgesetz für Sicherungsgeschäfte in Karl F. Kreuzer (ed.), Mobiliarsicherheiten - Vielfalt oder Einheit? (Baden-Baden 1998), pp. 125-34; Jan-Hendrik Röver, An Approach to Legal Reform in Central and Eastern Europe: The European Bank's Model Law on Secured Transactions in 1998/1999 European Journal of Law Reform vol. 1, pp. 119-35; Ulrike Seif, Der Bestandsschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht (Tübingen 1997), pp. 283-90; John Simpson and Jan-Hendrik Röver, Introduction in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994), pp. v-vii = An Introduction to the European Bank's Model Law on Secured Transactions in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and the Role of International Financial Organisations (London, Den Haag, Boston 1996), pp. 165-170 = *ibid.* in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998), pp. 439-43; John Simpson and Jan-Hendrik Röver, EBRD Model Law on Secured Transactions. A Response to Comments by John A. Spanogle (Washington 1995); John A. Spanogle, EBRD Model Law on Secured Transactions (Washington 1994); Elizabeth A. Summers, Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe in 1997 Review of Central and Eastern European Law 23, pp. 177-203 (186); Tibor Tajti, Comparative Secured Transactions Law (Budapest 2002), pp. 327-34; Margit F. Tveiten, Generalpant for Øst-Europa. En Modell-lov for nasjonale pantelover in Lov og Rett 1995, pp. 188-202; without author, A model law with nowhere to go? in Financial Times Eastern European Business Law May 1994, pp. 2-5; without author, A model way of doing business in East European Banker May/June 1994, p. 14.

[152] Cf. without author, Presentation of the Model Law on Secured Transactions in St Petersburg in Law in Transition Summer 1994, S. 12-4; John Simpson and Jan-Hendrik Röver, Model Law on Secured Transactions completed in Law in Transition Winter/Spring 1994, pp. 1-2; European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on 16 April 1994 in St Petersburg (London 1994) which contains the following articles: John Simpson and Jan-Hendrik Röver, Preface (p. iii); Ulrich Drobnig, The Comparative Approach of the EBRD's Model Law (pp. 1-2); Attila Harmathy, The Hungarian Experience with the Model Law (pp. 3-4); Mark M. Boguslawskij, The Model Law from the Russian Perspective (pp. 5-9); John Edwards, The International Practitioner's View on the Model Law (pp. 10-3).

[153] For the text see Annex 2; see also Jan-Hendrik Röver and John Simpson, General Principles of a Modern Secured Transactions Law (London 1997).

Model laws themselves are not applicable laws; they serve as examples which have to be implemented into national law or texts of public international law. A model law is a legislative proposal for national law which is often prepared by international organisations[154] and sometimes drafted by private groups.[155] Occasionally model laws are used to unify areas of law within a country. For example the US-American Uniform Commercial Code is not a federal law applicable in the United States. It is a model law prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, which has been implemented as state law.

6.6.4.2 Model laws as an instrument for the harmonisation of law

Model laws often intend to harmonise areas of law. Their aim is to be adopted by a number of countries (or states within one country as in the case of the Uniform Commercial Code) more or less wholesale. Examples are the UNCITRAL Model Law on International Commercial Arbitration which has by now been adopted by about 100 countries or the UNCITRAL Model Law on International Credit Transfers. The US-American Uniform Commercial Code offers an example for an intrastate model law intending to harmonise an area of law within one country.

The EBRD model rules, however, do not have the ambition to harmonise central and eastern European security laws. Their primary function is not harmonisation of law nor are they intended as a complete law for turnkey incorporation into local law. This is the result of a number of factors. Secured transactions does not lend itself to international unification. It is very much dependent on many areas of national law such as contract, property, civil procedure and insolvency law. Not surprisingly the variety of solutions in

[154] E.g. UNCITRAL Model Law on International Commercial Arbitration; UNCITRAL Model Law on International Credit Transfers; the UNIDROIT Principles of International Commercial Contracts also fulfil the function of a model for national legislation (see Preamble last sentence).

[155] See Draft International Antitrust Code prepared by the International Antitrust Code Working Group; see Wolfgang Fikentscher and Josef Drexl, Der Draft International Code. Zur institutionellen Struktur eines künftigen Weltkartellrechts in Recht der internationalen Wirtschaft 1994, pp. 93-9; Wolfgang Fikentscher and Andreas Heinemann, Der "Draft International Antitrust Code" - Initiative für ein Weltkartellrecht im Rahmen des GATT in Wirtschaft und Wettbewerb 1994, pp. 97-107.

the area of secured transactions is enormous as the Drobnig study demonstrated.[156] In addition, an international consensus about the fundamentals of secured transactions is only about to emerge. This is in stark contrast e.g. to the field of international sales of goods where after 50 years of successive attempts finally the Vienna Convention on the International Sale of Goods provided a successful instrument. The failure of UNCITRAL to draft a model law for security in movables served as a healthy warning not to be too ambitious.

There were not only good reasons for not being too ambitious. There were also good reasons for developing a model law for central and eastern European countries. Although far from being a region with a common legal tradition their laws were on one side influenced by the continental legal tradition and on the other hand they all lacked adequate rules on secured transactions. Both factors served as encouragement to undertake the drafting.

6.6.4.3 Awareness about the importance of secured transactions

The principal aim of the model is to raise **awareness** about the need for proprietary security in a market economy and, hence, the importance of secured transactions. It does this by summarising principles of modern secured transactions laws. The World Bank illustrated this aspect by embarking on a Secured Transactions Project for a number of central and south American countries; it made available the European Bank's work.

6.6.4.4 Guide to secured transactions legislation

The model law is also a guide to secured transactions legislation and thereby intends to be of assistance to national legislation. In this respect the model law only provides a basic framework for national legislators. The model aims to provide the essential elements without being overly complex, while leaving scope for the later introduction of refinements as an economy and a legal system develop. It cannot be compared with comprehensive

[156] Ulrich Drobnig, Legal principles governing security interests (document A/CN.9/131 and annex) in UNCITRAL Yearbook vol. VIII (1977), Part 2, II, A = pp. 171-221.

national secured transactions legislation under French or English law or Article 9 Uniform Commercial Code. The model is composed of only 35 articles, albeit with many sub-articles. The limitation to a basic framework was prompted by two main reasons. (1) The model law's limitations as to its contents allow it to be flexible and to respect national legal traditions. Because of the dependence of secured transactions law from civil law and civil procedure law the model law does not offer a detailed text for turn key incorporation into national law.[157] Every provision and every principle to be found in the model law inevitably require careful adaptation and refinement in the light of the laws and practice of each country. (2) The contents of the model law is not only limited because of the dependence of secured transactions law on related areas of law. The limitations also reflect the respect for national legislation. Professor Attila Harmathy pointed out, that there is no comprehensive model for national secured transactions laws because it is the task of the national legislator to develop provisions and to harmonise them with a legal system.[158]

6.6.4.5 Harmonisation of secured transactions law in the region?

Albeit the contents of the model law is necessarily limited, it appears to be the ideal vehicle for the support of secured transactions law reform. First, it is not based on a single national legal system, but derived from comparative work. A guiding principle was to produce a text that is compatible with the civil law concepts of many central and eastern European legal systems, while drawing on the common law solutions that were developed to accommodate modern financing techniques. The comparative approach was ensured by the involvement of an international Advisory Board and drafting by a team with mixed nationalities. Secondly, the model law gives drafting examples which can stimulate national legislators. It would have been possible just to give general advice; but the advice has to be applied and it is often only from the practical drafting of a law that the nature and extent of the legal issues are properly understood. It, therefore, seemed more efficient, and of more help to those seeking to develop their own laws, to draw up a guide in the form of a model law. Thirdly, the model law gives central and eastern European countries a common

[157] John Simpson and Jan-Hendrik Röver, Introduction in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994), p. v.
[158] Attila Harmathy, Das Recht der Mobiliarsicherheiten - Kontinuität und Entwicklung in Ungarn in Karl F. Kreuzer (ed.), Mobiliarsicherheiten. Vielfalt oder Einheit? (Baden-Baden 1999), pp. 75-90.

starting point for their secured transactions law reforms. The more successful the principles underlying the model law will be in practice the more secured transactions laws in eastern Europe will be harmonised which should be remarkable progress in an area of law still characterised by a great deal of diversity and a lack of attempts to harmonise.

6.6.5 Use of the model law[159]

The fundamental objective of the model law has been to encourage the countries of central and eastern Europe to improve their legal framework for secured lending for the benefit of creditors and borrowers, thereby assisting these countries in the transition process. In this respect it must be recognised that the drafting of legislation is only one of the initial steps in putting into place a complex system in which many parts interact with each other. Institutions and rules for the registration and publication of charges, for their enforcement and for their recognition in insolvency proceedings have to be established and put into practice. The EBRD's role in this process, in which the model law has served as a valuable reference point, consists of initiating discussions about a workable secured transactions environment and in defining achievable objectives, proposing revisions to existing laws or draft laws, exchanging views with policy and lawmakers on the rationale for such revisions and providing training to all those who have to apply a secured transactions system.

When the European Bank presented its Model Law on Secured Transactions in 1994 there were many questions about the practical value of this effort. The Financial Times Eastern European Business Law put it most bluntly: 'A Model Law with nowhere to go?'.[160] Ten years later there are tangible results of the EBRD's work and it is now also possible to put criticism into perspective. The model law project has indeed been of benefit in that it has helped to stimulate practical legal reform in many of the Bank's countries of operations. Particularly prominent has been the example of Hungary. Work on a new **Hungarian** draft security law was furthered by the model law and there was an exchange of information during the drafting of this law. This co-operation was facilitated by Professor Attila

[159] See for more details John Simpson, Ten years of secured transactions reform in 2001 Butterworths Journal of International Banking and Financial Law, p. 5; John Simpson and Jan-Hendrik Röver, The EBRD's Secured Transactios Project: a progress report in Law in Transition Spring 1996, pp. 20-4; Carsten Dageförde, Five years of the Secured Transactions Project - a survey in Law in Transition Spring 1997, pp. 12-3.

Harmathy being both a member of the Bank's Advisory Board and the chairman of the Hungarian Security Law Reform Commission. The draft law has been passed by the Hungarian Parliament in April 1996 and the Bank subsequently assisted in setting up a registration system.[161] Although the new Hungarian security law has been drafted quite independently from the model law, there are a number of parallels between the principles underlying both texts. Foremost both texts are based on the concept of a single security right for all types of charges.[162] As far as the creation of charges is concerned, the Hungarian civil code distinguishes mainly between mortgages over land which have to be registered in the land register,[163] registered charges over other types of property[164] which have to be registered in a charges' register held by the Hungarian Chamber of Notaries and pledges[165] which require a transfer of possession. The Hungarian law also allows great flexibility as to the ways in which the parties can describe and identify the secured debt and the charged property. Furthermore, it introduces public registration as the rule for the creation of charges.[166] In addition, enforcement does not necessarily require a court decision but can be initiated on the basis of a notarised document.[167] The law even introduces an enterprise charge and allows charging all the assets of an enterprise;[168] different from the model law it does, however, not provide for the remedy of a sale of an enterprise as a going concern. It should be noted that the enterprise charge is an institution which was already known to Hungarian law before the communist period.

In 1996 the Moldovan Parliament passed a Security Act incorporating many principles of the model law.[169] As of 1 January 2003 in Slovakia new provisions on security rights

---

[160] May 1994, pp. 2-5.
[161] See for first reports: István Gárdos, New Hungarian legislation on security interests: an improvement in the Hungarian secured lending environment in Law in Transition Summer 1996, pp. 1-6; Judit Bokaí and Orsolya Erdôs Szeibert, Die Mobiliarhypothek und deren Register in Bundesnotarkammer (ed.), Festschrift für Helmut Schippel zum 65. Geburtstag (München 1996), pp. 843-68; John L. Simpson, New System for the registration of charges in Hungary in Law in Transition Summer 1996, pp. 7-10.
[162] See sec. 251 (1) Hungarian civil code.
[163] Sec. 260 (1).
[164] Sec. 260 (2).
[165] Sec. 261 (1).
[166] Sec. 260.
[167] Sec. 262 (2).
[168] Sec. 254.
[169] Act No. 601 "Lege cu privire la gaj" in Monitorul Oficial al Republicii Moldova Nos. 61-62 of 20 September 1996, pp. 28-33.

became effective which build upon the model law.[170] Like in Hungary the registered security is registered electronically with the Chamber of Notaries. Consultation and co-operation with national officials in connection with the preparation of new secured transactions legislation has also taken place in a number of other countries, including Azerbaijan, Bulgaria, Kyrgyzstan, Latvia, Poland, Romania and the Russian Federation. In November 1994 the model law, along with Article 9 United States' Uniform Commercial Code and the pledge provisions of Part 1 of the new Russian civil code, served as a framework for discussion of the secured commercial lending in the CIS at a conference in Moscow.[171] The conference was co-sponsored by several Russian institutions, among them the High Arbitration Court of the Russian Federation, as well as USAID and the European Bank and stimulated the drafting of a new Russian Mortgage Act on the draft of which the EBRD commented extensively.[172]

6.6.6 Organisation of the EBRD model law

The model law is divided in five large parts. Part 1[173] contains general provisions which determine who can give a charge and who can receive a charge as well as general rules concerning the secured debt and the charged property.

Part 2[174] deals with rules on the creation of charges and introduces the general distinction between registered charges which have to be registered at a charges' register, possessory charges for which registration is not required but where the chargeholder takes, and must retain, possession of the charged property, and unpaid vendor's charges which protect suppliers of goods who seek a retention of title. Part 2 also contains rules about the defences of a chargor against a charge and the rights and obligations of chargor and

---

[170] Allen & Overy and European Bank for Reconstruction and Development (eds.), Guide for Taking Charges in the Slovak Republic (without place 2003).
[171] See Jonathan Bates, Lane Blumenfeld, David Fagelson, Vladimir Fedorov, Dmitry Labin, Jan-Hendrik Röver and John Simpson (eds.), International Conference on Secured Commercial Lending in the Commonwealth of Independent States. Conference Proceedings (London, Maryland 1995).
[172] See John Simpson and Jan-Hendrik Röver, Comments on the Draft Federal Act on Mortgage (Pledge of Real Estate) of the Russian Federation (London 1996).
[173] Arts. 1-5.
[174] Arts. 6-16.

chargeholder and introduces the concept of a charge manager who is designed to stand in the place of the chargeholders for most dealings concerning the charge.

Part 3[175] provides for the cases where third parties are involved, in particular the priorities between different chargeholders, the transfer of a secured debt (and a charge), the licence of the chargor to deal in charged property and the acquisition by third parties of things or rights which are subject to a charge.

Part 4[176] sets out a system of enforcement proceedings. The model law allows the person taking security to enforce the charge immediately after a failure to pay the secured debt. There is no requirement of a separate court order to enable the chargeholder to enforce his charge and the model allows considerable flexibility to the person enforcing a charge whilst including necessary protections against abuse. The enforcement rules will have to be adapted to local procedural rules. In particular, the model law has to interface with local insolvency laws; it was thought, however, that the scope of the model law should be limited to secured transactions law proper and, therefore, art. 31 contains only a few general principles to be taken into account by local insolvency legislation. Part 4 of the model law is completed by a definition of the different events which cause a charge to terminate.

Lastly, Part 5[177] sets out rules for registration at a separate charges' register. Again these will need to be supplemented according to the needs of each country. In this context it is of particular importance that registration does not involve cumbersome procedures but remains a simple, low cost administrative act.

6.6.7 Key concepts of the EBRD model law

The UNCITRAL report on the issues to be considered in the preparation of uniform rules on security interests tabled six major questions which had to be dealt with in a security law.[178] A law on security (in movables) has (1) to determine what types of movables are

[175] Arts. 17-21.
[176] Arts. 22-32.
[177] Arts. 33-5.
[178] UNCITRAL Yearbook 1980, part two, III, D, document A/CN.9/186, para. 10.

covered by the law and (2) to deal with formalities required for the creation of security. In addition, (3) the extent of freedom of contract between debtor and secured creditor and (4) the rights of the secured creditor against third parties have to be provided for. (5) Also the requirements for the rights to be effective against third parties are to be dealt with and (6) enforcement provisions have to be included. This list of questions is not a comprehensive list of issues arising in the context of security law. It was, however, a helpful starting point for the European Bank's work.

Although it is impossible to explain the details of the model law within the confines of this study a few typical provisions can demonstrate the general approach and style of the text.[179]

6.6.7.1 Single security right

The model is based on the concept of a single security right for all types of things and rights.[180] The single security right is called a 'charge'. This name may seem unfortunate because it could lead to the misunderstanding that the security right under the model law is based on the notion of the English security interest 'charge'. The term 'charge' is, however, only a linguistic borrowing from the English language. The security established by the model law is subject to the rules of the model law and has little in common with the English charge. The word 'security', on the other hand, was not used for the right created by the model law because it can be, and often is, confused with 'securities' in the sense of 'negotiable instruments'.

Calling the charge a 'single security right' provides a comfortable label. It does, however, not say in which sense the right is a unitary one. One has to distinguish several aspects in order to understand the concept of a single security right. First, the model is applicable to all types of property. Art. 5.2 of the model emphasises this wide scope of application.

---

[179] See also John Simpson and Jan-Hendrik Röver, General Principles of a Modern Secured Transactions Law in (1997) NAFTA Law Review III, pp. 73-81 = Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1998), pp. 143-55; Jan-Hendrik Röver, Security in central and eastern Europe and the EBRD's Model Law on Secured Transactions in Law in Transition Autumn 1994, pp. 10-4.

[180] Art 1.1; principle of unity; for a comparative overview see Jan-Hendrik Röver, Prinzipien, §§ 11, 12 = pp. 170-87.

Secondly, the general provisions of the model in arts. 1 to 5 apply to all charges. Thirdly, the provisions on the involvement of third parties in arts. 17 to 21 apply equally to all charges. The same can be said about the provisions on enforcement in arts. 22 to 32 and the insolvency principles of the model law.[181] The model does not, however, create a single right as far as the creation of the charge is concerned. In this respect it distinguishes three different ways of creating a charge.

Hence, the concept of a single security right is to create in principle a single charge, regardless of the nature of the property, the character of the debt, or the attributes of the person giving or receiving the charge. The model does not, however, go as far as the so-called functional approach of Article 9 of the Uniform Commercial Code of the United States which covers 'any transaction which is intended to create a security interest'.[182]

6.6.7.2 Right in property[183]

The charge is a limited right in a property right[184] and not a mere contractual obligation. The liability of the chargor is limited to a right to sell the charged property in enforcement proceedings in order to satisfy a secured debt.[185] Proprietary qualities of the charge are also demonstrated by the fact that charged property can in principle not be acquired by third parties free from the charge[186] albeit there are exceptions to this rule.[187] The model law also indicates that the charge must give priority in the insolvency of the chargor over unsecured creditors.[188] However, this is formulated only as a principle. Issues of insolvency law were generally left to national law.

6.6.7.3 Securing business credits

---

[181] Art. 31.
[182] § 9-102 (1) (a) of the Uniform Commercial Code; see Jan-Hendrik Röver, Prinzipien, § 11 II 4 = pp. 174-5.
[183] Arts. 1.1, 21.1, 21.2, 26.1, 31.3; for the charge as a property right see also John Simpson and Jan-Hendrik Röver, EBRD Model Law on Secured Transactions. A Response to Comments by John A. Spanogle (September 1994) (Washington 1995), pp. 4-5; for a comparative overview see Jan-Hendrik Röver, Prinzipien, § 9 = p. 137-58.
[184] See wording in art. 1.1: "encumbered".
[185] Art. 26.1.
[186] Art. 21.1.
[187] Art. 21.2.

An important limitation of the scope of the model law must be highlighted which also emphasises its nature as a mere model. The model law is limited to securing business credits.[189] A natural person can only give security in relation to business transactions and not for consumer transactions. The reason for this restriction is that the European Bank for Reconstruction and Development did not want to enter the difficult and highly political field of consumer protection. The Bank also saw the more immediate need in improving the business environment. However, the model can be extended to cover also consumer transactions. This will require the addition of adequate rules on consumer protection. The basic elements for secured transactions in a business context and in a consumer context are the same. It is, therefore, possible to build from the model law a more comprehensive system encompassing consumer transactions.

6.6.7.4 Flexible definition of secured debt and charged property

There is a great flexibility in the way in which the parties can define the debt which is secured and the things and rights which are given as security.[190] The secured debt can be a single debt or more debts, the charged property can be one or more things or rights.[191] In both cases they can be described specifically or generally.[192] They can be present or future and they can change during the life of the charge, as long as they are identified at the outset.[193] The model even allows the charged property to be described as all the assets of an enterprise and thereby introduces the concept of an enterprise charge.[194] These principles allow a similar flexibility in describing and identifying secured debt and charged property as can be found under US-American floating liens[195] or English floating charges.[196]

6.6.7.5 Public registration of charges

---

[188] Art. 31.3.
[189] Art. 2 first sentence.
[190] Arts. 4.1, 5.1; 4.3.2, 7.3.2; 5.5, 7.3.4, 8.4.4; 4.3.4, 4.4, 5.8, 6.8; 5.6.
[191] Arts. 4.1, 5.1.
[192] Arts. 4.3.2, 7.3.2; 5.5, 7.3.4, 8.4.4.
[193] Arts. 4.3.4, 4.4, 5.8, 6.8.
[194] Art. 5.6.
[195] Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston Mass. 1993), chapter 10.

The model works on the principle that charges should be a matter of public knowledge. Since Roman law there has been scepticism about the idea that a person may create secret rights in its assets. A person who gives assets as security but does not indicate this to his potential creditors creates an impression of 'false wealth'. The model achieves publicity by relying on registration of charges at a separate charges' register. It does not put its emphasis on possession as a means of achieving publicity because efficient business finance requires chargors to be left in possession of charged assets to work with them. The model law's registered charge provides a legal framework to achieve this objective. Unlike common law systems[197] which regard registration as a requirement for perfection of a security interest which has attached previously, the consequences which flow from the registered charge depend on a registration statement being presented to the registry.

This system obviously requires the existence of a registry for charges. The registry should possess the information necessary for third parties to become aware of charges and to make informed investment decisions. The information required to be registered should be minimal. The model law aims at making the procedure as simple and as cost-efficient as possible for the parties whilst still providing sufficient information on the register for third parties to be adequately informed.

However, the model law recognises possessory charges which do not require any registration but the taking of possession.[198] Another exception from the registration requirement is the unpaid vendor's charge.[199] Its purpose is to avoid registration for short-term credits in the context of the sales of goods.

6.6.7.6 Use of charged property

[196] Roy Goode, Commercial Law, 2nd ed. (London 1995), chapter 25 = pp. 730-44.
[197] In particular Article 9 Uniform Commercial Code and the provisions of English law governing company charges.
[198] Arts. 6.3.1, 6.4, 10.
[199] Arts. 6.1.2, 6.3, 9.

The basic rule is that a third party acquires charged property subject to any existing charges.[200] However, the chargor can transfer title to charged property free from the charge without the consent of the chargeholder in cases in which he holds a legal licence to do so.[201] The three cases of such a legal licence are sales in the ordinary course of trading activities, transfers in the ordinary course of business and certain assets subject to an enterprise charge. In addition, chargor and chargeholder can agree an additional contractual licence.[202] In the cases of a legal or a contractual licence the chargor is, within the limits of the respective licence, free to deal in the charged property.

6.6.7.7 Broad rights of enforcement

Part 4 of the model law regulates the end of the life of a charge which can occur by virtue of enforcement or other events of termination.[203] Enforcement aspects are essential for the proper working of security. The model, therefore, contains detailed rules on enforcement. It must, however, be seen on a jurisdiction-by-jurisdiction basis how these rules can be adapted to an individual legal system and can be tied in with the existing court procedures. The central aim of the enforcement mechanism is to provide, as much as possible, for a cost-efficient and speedy self-help regime for the chargeholder without the need to rely on recourse to a court.

The beginning of this process depends on the charge becoming immediately enforceable[204] which by definition requires that there is a failure to pay the secured debt.[205] There is no requirement of a separate court order to enable the person taking security to enforce his charge but he must deliver an enforcement notice to the chargor in order to inform the chargor about the beginning of enforcement proceedings. The remainder of Part 4 of the model law sets out rules for the procedure which apply when a chargeholder seeks to enforce his charge.

---

[200] Art. 21.1.
[201] Art. 19.
[202] Art. 20.
[203] Arts. 22-30.
[204] Art. 22.2.
[205] Art. 22.1.

Arts. 23 and 24 govern the next step in the quest of the chargeholder for satisfaction of the secured debt. Art. 23 sets out measures for the protection of the charged property. These measures relate, for example, to taking possession of movable things[206] and the maintenance of charged property's value.[207] The chargeholder is also empowered to apply to the court for orders in relation to protecting the charged property.[208]

Once protection is assured the chargeholder may rely on the measures for realising the charged property.[209] The model adopts the principle that enforcement should in the first instance be a matter of self-help by giving the holder of the charge the right to sell the charged property. The person holding the charge is being given broad, but clearly defined, rights to sell the charged property in whichever way he considers most appropriate. The means of transfer by way of sale is, therefore, flexible[210] whilst the chargeholder is obliged to endeavour to realise a fair price.[211] Purchasers of charged property from either a chargeholder or an enterprise administrator are protected by Article 26 and acquire title to charged property under this provision.

Any interested party may apply for court protection[212] and claim damages for loss suffered as a result for wrongful or abusive enforcement.[213] Persons who may be entitled to the proceeds of sale are further protected by the requirement that distribution be made through a depositary of the proceeds.

6.6.7.8 Enterprise charge[214]

The model opens the way for taking a charge over all the assets of an enterprise. The enterprise charge under the model law has three distinct features. The model law allows (1)

---

[206] Art. 23.1.
[207] Art. 23.4.
[208] Art. 23.5.
[209] Art. 24.
[210] Art. 24.4.
[211] Art. 24.3.1.
[212] Art. 29.
[213] Art. 30.
[214] Arts. 5.6, 8.4.5, 22.7, 25.

to describe the charged property as all the business assets of an enterprise,[215] (2) for the pool of assets to change constantly its composition[216] and (3) in enforcement proceedings to chose an alternative way of enforcing the charge by appointing an 'enterprise administrator', to continue the enterprise and to realise the charge by selling the enterprise as a going concern[217]. In addition, a special rule for priorities exists for enterprise charges (art. 17.5). The enterprise charge will typically be taken by financial institutions and often conflict with the security taken by suppliers of goods which are secured by a retention of title clause or equivalent security[218]. Under the model law the supplier will take priority under an unpaid vendor's charge pursuant to art. 17.3.

The main purpose of this procedure is to prevent liquidation and to keep the enterprise alive as a going concern. Thus, it allows for an enterprise in financial distress to be rehabilitated whilst potentially increasing the amount recovered by creditors. Under the provisions relating to enterprise administration, the enterprise administrator is in a position of carrying on the business of the enterprise and finally selling it as a going concern. Such a remedy would necessarily have to be applied in a manner consistent with the applicable insolvency law.

6.6.7.9 Minimum restrictions

Traditionally, property law in civil law countries consists predominantly of mandatory provisions. In many respects this is also true for the model law. Nevertheless, the parties to the charge are given maximum flexibility to arrange their relationship as best suits their needs. Mandatory requirements and restrictions on what the parties can agree have been kept to a minimum. The flexibility resulting from this policy is best seen in the wide freedom of the parties to determine, i.e. define and identify the secured debt and the charged property.[219]

---

[215] Art. 5.6.
[216] There is a legal licence for the transfer of charged property in art. 19.3; it covers property which needs to be registered not only in the charges' register. See for the different aspects of a security right which is dynamic in nature in respect to the charged property chapter 12.2 and 12.3 below.
[217] This additional remedy is called 'enterprise charge administration', art. 25.
[218] E.g. an unpaid vendor's charge (art. 9) under the model law or a security interest under Article 9 UCC.
[219] See 6.6.7.4 above.

6.6.8 Critique of the model law

Critical comments on the model law have focused on three questions:[220]

(a) whether or not the inclusion of immovable property and thereby the creation of a charge encompassing all types of property was adequate;
(b) whether or not the unpaid vendor's charge concept creates a regime which is too favourable to credit sellers; and
(c) whether or not the enforcement provisions are too protective and therefore too much in favour of the chargor.

6.6.8.1 Inclusion of immovable property

The model law has indeed, from its earliest stages of development, been designed to include immovable property; both the Hungarian and the Moldovan security laws have embraced this approach.[221] This inclusion is not an essential element, but a rigid exclusion of immovable property would have been against the underlying philosophy of establishing a facilitative legal framework for all types of assets. At the same time it has always been acknowledged that security laws often make a distinction between security in land and security in movables. This may also be a convenient approach for many countries in central and eastern Europe, particularly where the concept of a separate land mortgage is practised and where a working land registry is in place. However, the model law is intended to represent a starting position and, for a country which has no existing regime for security over immovable property, there is no reason why in substance the legal nature of a charge

[220] See John A. Spanogle, EBRD Model Law on Secured Transactions (Washington DC 1994); John Simpson and Jan-Hendrik Röver, EBRD Model Law on Secured Transactions. A Response to Comments by John A. Spanogle (Washington DC 1995); John A. Spanogle, A Functional Analysis of the EBRD Model Law on Secured Transactions in (1997) NAFTA Law Review III, pp. 82-95 = Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1998), pp. 157-173; Karl Kreuzer, The Model Law on Secured Transactions of the EBRD from a German Point of View in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1998), pp. 175-95.

[221] English law is equally based on the notion that the security interests are generic interests which can be used for various types of assets.

as a property right should not be the same for both movable and immovable property. All security rights can be reduced to the same conceptual foundations.[222]

In many jurisdictions title to land will be shown in a separate register. In that case, under the model law, registration of a charge also in the separate register would be required under art. 11. If the charge over land is not registered in the charges' register but only in the land register the value to potential creditors of a search at the charges' register is reduced. The position of other types of property with title registered in a separate register (for example ships or aircraft) is similar. At a later stage it will be possible to introduce registration systems with automatic computerised linkage between different registers. In the meantime the inconvenience of dual registration has to be weighed against the advantage of easily accessible information.

6.6.8.2 Tale of two creditors: lender and credit seller

Early consultations during the drafting process of the model law indicated a strong desire to include the credit seller in the scope of the model and this led to the inclusion of the concept of an unpaid vendor's charge. Retention of title has become an accepted practice in much of Europe and it was felt that if the model avoided the issue uncertainty would arise for lenders as to whether title to property had passed to a borrower, or had been retained by the supplier, as well as on questions on priority. The unpaid vendor's charge transforms the security of the unpaid vendor for a limited period of six months into substantially the same right as that of the registered chargeholder. In addition, the model envisages a very simple means of converting an unpaid vendor's charge into a registered charge.[223]

The relative priorities of lender and credit seller are essentially an economic question. In any market economy the supply of goods on credit and the lending of money are both important components to support economic activity. If a supplier has no security over the goods he has supplied he is less likely to agree to credit. If the supplier is given security

[222] See F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), pp. vi, 77, 78, 146, 225-6; see also the English Property Act 1925 whose title is: "An Act to Assimilate the Law of Real and Personal Estate".
[223] Art. 8.2.

then a lender is less likely to grant credit on the basis of security over the same goods. Two parties cannot be expected each to grant credit on the basis of the same security unless they are persuaded that it is adequate to cover both of them. Somewhere a balance has to be struck and the model seeks to do this in the context of jurisdictions where secured lending is new and many businesses may rely on the credit that is given to them by their suppliers. The attraction of inventory financing has to be set against the dangers of businesses raising money against the security of assets that they have not paid for and the lender taking priority over the unsuspecting supplier.

The idea of requiring registration for all unpaid vendor's charges (and thereby adhering to the principle of publicity) was rejected since it would favour the major sophisticated supplier and the lender over the small supplier who would find registration more of a burden, both administratively and psychologically. The absence of registration makes it more difficult for potential lenders to determine with any certainty whether a charge exists over recently acquired assets. No system of registration can produce perfect transparency which reveals all limitations on a person's right to the property he appears to own. In practice lenders may have to assume that any property of a borrower that has been acquired within the preceding six months is subject to a charge unless the borrower demonstrates that the vendor has been paid or that no charge has been created.

The system provided in the model does not preclude lending secured on inventory. However, the lender who relies on security over the inventory has to ensure that the same inventory has not been supplied by a vendor in reliance on an unpaid vendor's charge. This is similar to the position in many jurisdictions where retention of title provisions are commonly included in sale contracts. There are many ways in which the lender can protect himself by contract (such as by ensuring that the vendor is paid, by ensuring that no vendor's charge is created in the first place or by supplementing his security).

6.6.8.3 Enforcement provisions of the model law

It has always been recognised that the enforcement provisions will have to be adapted to existing civil procedural laws of a country even more than other parts of the model law.

They can, therefore, only give a first idea of what a workable enforcement system for secured transactions might look like. It is, however, important to realise that the model law does not try to promote single-sidedly the interests of the chargeholder. It seeks to strike a balance between interests of both chargor and chargeholder. As the chargor faces the danger of losing his rights in the charged property he must have a way of challenging improper acts of the chargeholder. Also the interests of other parties with rights in the charged property cannot be ignored. Where protections lead to a loss of efficiency in the security regime this is counter-balanced by a gain in social peace.

6.6.8.4 Conclusion

The model law has demonstrated that it can serve as a basis from which national law can be developed. It is an example for law reform assistance which does not rest on a ready-made solution taken from a specific national law. The basis from which the model law was built is rather a set of principles derived primarily from comparative research.[224] Therefore, the model law enables an application of what was earlier called the 'choice model of legal reform'. Both the method of using a model law for the purpose of law reform and the principles of secured transactions law underlying the model law (if not its actual text) may stimulate future reform work. It may well be that this exercise of developing modern legislation for secured transactions in central and eastern Europe will even provide useful lessons for other parts of the world.

7 General principles of security law

In an earlier study I have looked into the general legal questions of security law and described a number of general comparative principles. I distinguished in particular the security principle,[225] the principle of property right,[226] the principles of security in own

[224] See John Simpson and Jan-Hendrik Röver, General Principles of a Modern Secured Transactions Law in (1997) NAFTA Law Review III, pp. 73-81.
[225] See Jan-Hendrik Röver, Prinzipien, § 8 = pp. 130-6.
[226] See Jan-Hendrik Röver, Prinzipien, § 9 = 137-58.

property and in property held by another person,[227] the principles of form and functionality[228] and the principles of unity and multiplicity.[229] The results of this study shall be summarised briefly in this chapter to be available for the purposes of the new study.

7.1 Security principle

7.1.1 Analytical principle

Fundamental to national security laws is the security principle according to which security interests protect the likelihood of the satisfaction of a debt (but not the satisfaction of the debt itself). Technically this is achieved in the examined legal systems in two ways: (1) a distinction between security interest and secured debt and (2) at the same time a link between security interest and secured debt (which is most obvious in the fact that a security interest can only be enforced once the secured debt has not been satisfied).

7.1.2 Normative evaluation

Legal systems implementing the security principle in the above described sense have the opportunity to achieve the macro- and microeconomic functions of security. However, the specific institutions of a national security law decide whether or not a law fully achieves the potential economic effects of security. It is these distinctions which the economic discussions of security often do not take into account but which ultimately decide upon the normative evaluation of a security system.

7.2 Principle of property right

7.2.1 Analytical principle

The legal systems examined featured a class of security which can be distinguished from personal rights by its specific proprietary legal effects. The principle of property right had

[227] See Jan-Hendrik Röver, Prinzipien, § 10 = 159-69.
[228] See Jan-Hendrik Röver, Prinzipien, § 11 = 170-8.

two elements: (1) the security interest was created in particular assets of the person giving security and (2) the security interest had effects not only between the contractual parties but also against third parties. Against the background of the security principle and the principle of property right it can be shown that proprietary security interests achieve security in three different ways: (1) they prevent non-satisfaction of the secured debt by providing a remedy to the securityholder; (2) they also allow the securityholder to receive satisfaction from charged property where the secured debt is not satisfied; (3) lastly, security interests designate certain assets exclusively for the satisfaction of the securityholder; the securityholder may use this allocation positively or negatively. It is used positively if the securityholder enforces the security interest and it is used negatively if he excludes other creditors from enforcing their rights into certain assets. In the latter case security rights serve as mere protection rights ("*Abwehrrechte*") only.[230]

The legal systems showed three different types of proprietary effect: (1) German law and the model law in particular had implemented a one step proprietary effect: proprietary rights are created once all legal requirements are fulfilled both as between the parties and against third parties. (2) American law featured a two step proprietary effect: the security interest attaches in a first step between the parties and has effects against third parties only when perfection requirements are met. Interestingly American law knew situations in insolvency when the principle of property right was replaced by the value principle since satisfaction came not from a specific asset any longer but it was only the value of the initial asset which served as a measure for the satisfaction. (3) English law started from the premise of a two step proprietary effect. However, it also distinguished between legal and equitable rights, i.e. two different levels of proprietary effect. It also recognised a floating charge which provided a true property right only once a crystallisation event had transformed the floating charge into a fixed charge.

7.2.2 Normative evaluation

---

[229] See Jan-Hendrik Röver, Prinzipien, § 12 = 179-87.

[230] See for this aspect of security interests Philip R. Wood, Project Finance, Subordinated Debt and State Loans (London 1995), no. 5-1; see also a similar distinction of functions of events of default in project

The principle of property right is of fundamental importance to any security law which intends to achieve the economic functions of security. In the earlier study it was noted that the attachment step of the two steps proprietary effect offered only limited protection. Even more doubtful seemed interests like the floating charge under English law which initially had no proprietary effect.[231] Such security cannot provide effective risk reduction to the securityholder and is, therefore, in practice accompanied often by fixed charges. It appeared that the principle of one step proprietary effect most optimally served the risk reducing function of security. However, it had to be noted that the proprietary effect of a particular security interest could always – even under the principle of one step proprietary effect – be affected by the proprietary effect of another security right (a situation arising when different security rights conflict with each other).

7.3 Principles of security in own property and in property held by another person

7.3.1 Analytical principle

English and German law know two types of security, security in own property and in property held by another person. It should be noted that the notion of ownership is different in English and German law.[232] The model law introduced with the charge a security right in own property only. American law, lastly, leaves behind the distinction between security in own property and in property held by another person. Important is only the entitlement (the interest under English law), i.e. the power to enforce the security interest.

7.3.2 Normative evaluation

Both security in own property and in property held by another person seem to be adequate with a view to the risk reducing and the information function of security. It should, however, be noted that security in property held by another person allows the person giving

---

finance loan agreements by Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Projekte und Projektfinanzierung (Munich 2001), chapter 6.2.6.10.3 = pp. 223-4.

[231] The effects of the floating charge have recently been weakened by the Enterprise Act 2002 even further in particular by the introduction of a fund for unsecured creditors; see chapter 6.3 above.

[232] For a general discussions see chapter 11 below.

[232a] This is, however, not the case with respect to assignments under English law.

security to create several security interests in the same charged property. With security in own property the person giving security looses its entitlement in the charged property once he has granted a security interest.[232a] Although both security in own property and in property held by another person can equally fulfil the economic functions of security they may create imperfections where a legal system has developed security in own property for overcoming structural weaknesses of existing security interests. This could be shown at the example of German law where security for loan credit and security for sale credit conflict. Only legal systems which avoided those conflicts (like the English legal system or American law) maximised the economic benefits of security law.

7.4 Principles of form and functionality

7.4.1 Analytical principle

The scope of security interests can be determined by reference to the principles of form and functionality. According to the **form principle** the parties chose which security interest shall govern their legal relationship. Parties have a certain freedom of choice between different types of security. This was the solution found under German and English law and to a limited extent under the model law. Quite different is the **functionality principle** where the scope of a security interest is determined on the basis of whether or not the parties' agreement fulfils a security function. Thus security interests in a narrow sense but also transactions circumventing proper security law are governed by the rules of security law. This principle is applied under Article 9 UCC and under the rules of the security acts of those Canadian provinces which have implemented Article 9 UCC.

7.4.2 Normative evaluation

The functionality principle allows to prevent the circumvention of a security system. In this sense it optimally implements the principle of risk reduction since it provides a creditor with the comfort that he cannot be surprised by interests which are functionally equivalent to security but are not subject to the rules of security law. This is particularly dangerous for a creditor where such interests are not (at least potentially) known to him due to a lack of

publicity. The functionality principle is, therefore, an attractive legislative model but practice shows that questions of the definition of the scope of security law do not disappear altogether and satisfactory solutions to them could not be found. Under American law a particularly difficult issue is the distinction between financing and true leases.

As long as the issues of definition of scope still exists (and it is to be expected that it will be difficult to solve them) the principle of form keeps its economic legitimacy. However, this applies only to the extent that the principle of form does not create conflicts between different types of security which reduce the efficiency of security. The economic efficiency of the principle of form can ultimately be evaluated only in the context of the principles of unity and multiplicity.[233] In any event the principle of form is an economically efficient alternative to the principle of functionality if it is combined with a unification of the types of security. E.g. as far as security in movables is concerned the parallelism between security in property held by another person (often in the form of pledges), security transfers and retentions of title can be merged into one type of security interest. Similarly for security in receivables the security interest in property held by another person (e.g. pledges) and security assignments can be subsumed in one security interest. Other transactions circumventing security law than those already covered can become subject to the security interest at a later point in time where the principle of form applies.

7.5 Principles of unity and multiplicity

7.5.1 Analytical principle

Under the principle of unity which can be found under American law for security in movables and under the model law for all types of property substantive law provides only one type of security for very few types of security. However, with the principle of unity certain distinctions are made concerning different types of creation, different types of collateral etc. The principle of unity can be supported by the principle of functionality. Since it is one of the purposes of the principle of functionality to define the scope of

[233] See chapter 7.5.

security law widely, it is avoided that other transactions than secured transactions in a narrow sense circumvent security law.

Under the principle of multiplicity many types of security interests are provided or developed in customary law. It could be found in English, German and French law. Advantageous for a multiplicity of security interests is the form principle which tends to lead to a dissipation of security interests. Differentiation of security interests is often oriented at the two fundamental elements of a security interest, the secured debt and the charged property. There are legal systems like German law which develop security rights with different types of dependency between security right and secured debt. In addition, different types of security can be created for immovable and movable things, receivables, other rights etc. which can each follow their own distinct rules. Other common criteria to differentiate are the contents of an interest (security in own property or security in property held by another person) or the type of possession in the charged property (possessory and non-possessory security). The distinction between the principle of unity and the principle of multiplicity is, hence, linked closely to the distinction between principle of form and principle of functionality[234] The study showed also that both the principle of unity and the principle of multiplicity can find their limitations. For this English law was an important model where the different types of security interests (in a narrow sense) have in principle the same rules as far as priority, enforcement and insolvency are concerned.

7.5.2 Normative evaluation

The principle of unity limits the possibilities of collisions between different types of security interests. Proprietary security leads to collisions if several security interests are created in the same charged property. However, the provision of different types of security interest in itself does not yet lead to collisions. The existence of mortgages in immovable property and of non-possessory security rights in movable things is not problematic since it does not create any relevant collision between different types of security interests. The assignment of security interests in movable things on real estate either to the law of

movable property or real estate law is a matter of scope of these areas of law. It has to be noted as well that an avoidance of collisions is not achieved completely by the principle of unity since within the principle of unity distinctions with respect to the security interest are made. In any event the person taking security finds with the principle of unity a maximum implementation of the risk reduction principle – as long as the "internal differentiations" of the principle of unity are kept to a minimum.

The principle of multiplicity reduces the economic efficiency of security. The differentiation of many types of security is often the result of historic vagaries, which slowly undermine the system of security law. It is difficult to guarantee the co-ordination of different types of security. However, English law demonstrates that despite an application of the principle of multiplicity at the surface with a unitary solution to the issues of priority, enforcement and insolvency a co-ordination between different types of security can be achieved. Here the principle of multiplicity in its effects is getting so close to the principle of unity that a loss of economic efficiency is avoided.

[234] This has often led to no distinction being made between the two different pairs; see e.g. Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), pp. 47-8.

Part III

The Secured Debt

Parts III and IV of this study which are devoted to issues of substantive law will deal with the secured debt and the charged property. Security enhances the possibility of performance of a debt which it secures.[235] The rules relating to the secured debt form, therefore, the first fundamental building block of security. The legal life of the debt is not a matter for security law but for contract law.[236] Security law must, however, determine (1) the contents of the debt which can be secured by security,[237] (2) the extent to which the secured debt is secured[238] and (3) the relationship between the secured debt and security[239].

8 The contents of the secured debt

8.1 Legal issue

The first legal question with respect to the secured debt is which contents the secured debt can take, i.e. what can be secured by security. This issue falls into a number of different facets. (1) The understanding of a legal system of what constitutes a debt, (2) the issue whether only monetary or also non-monetary obligations can be secured, (3) the issue whether only unconditional or also conditional debts can be secured, (4) the issue whether only present or also future debts can be secured, (5) the issue whether only debts governed by local law or also debts governed by foreign law can be secured and (6) whether the secured debt must be valid and enforceable.

8.2 Legal solutions

---

[235] See the security principle under chapter 7.1.1 above.
[236] The term "contract law" should be construed widely. Secured debts can also be of a non-contractual nature (see chapter 8 below).
[237] See chapter 8 below.
[238] See chapter 9 below.
[239] See chapter 10 below.

8.2.1 English law

8.2.1.1 Debts

Under English law the term "debt" refers to monetary obligations which bind the debtor to pay a fixed, certain, specific, or liquidated sum of money.[240] Such a debt can arise by operation of contract or by operation of law. A debt can also be documented in an instrument. Documentary debts are debts which are supported by an additional debt arising out of an instrument. Typical examples are bills of exchange, promissory notes and cheques.[241] Often the instruments are negotiable instruments in that anyone taking the instrument in good faith and for value obtains good title in it.[242] A particular type of instrument under English law is the debenture. It evidences a payment obligation of a company as well as the security interests created to secure it.

8.2.1.2 Monetary and non-monetary obligations

Under English law security interests in principle secure credits, which can take one of two forms only: a loan of money (loan credit) or the deferment of a price obligation (sale credit).[243] Credits are always **monetary obligations**. The contents of a monetary obligation is often defined by reference to the principle of nominalism. Hence a monetary obligation involves the payment of so many chattels, being legal tender at the time of payment, as, if added together according to the nominal value indicated thereon, produce a sum equal to the amount of the debt.[244]

Under English law security can be taken also for **non-monetary obligations** (e.g. a covenant to repair) but ultimately the liability has to be expressed in monetary terms (i.e.

---

[240] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), p. 63.
[241] See for bills of exchange under English law Roy Goode, Commercial Law, 2nd ed. (London 1995), 19 6 (i) = p. 545 *et seq.*
[242] F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), p. 28. Negotiable instruments which represent a debt must be distinguished from documents of title which represent goods; examples for the latter are bills of lading, delivery warrants and warehouse receipts; see F.H. Lawson and Bernard Rudden, *op. cit.*, p. 31.
[243] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 2 (i) = pp. 637-9.
[244] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), p. 84.

damages for breach of covenant) if it is desired to enforce the security.[245] In project finance (but also other types of corporate financings) an indirect cover of non-monetary obligations by security can be observed. E.g. where an information covenant (i.e. a non-monetary obligation) is violated under a project finance loan the lender may accelerate the loan and thus also enforce the security interest securing the loan.

8.2.1.3 Unconditional and conditional debts

A conditional or contingent debt is one which is dependent on an event the occurrence of which is uncertain.[246] Conditions may be in the form of conditions precedent or conditions subsequent. A **condition precedent** in principle delays the validity of an agreement.[247] A debt under a condition precedent is not valid until the condition has been met. Such a debt will, hence, be treated like a future debt for the purposes of security law.[248] A **condition subsequent** in principle renders an agreement invalid subsequently. A debt under a condition subsequent becomes invalid with the occurrence of the condition subsequent and, therefore, terminates.

8.2.1.4 Present and future debts

A **present debt** is a debt which exists at the time of the creation of the security interest. Such debts can always be secured by English law security interests. Sometimes debts may be created, due and payable before creation of a security interest. Although such debts do not cause concern from the point of view of English security law, the securing of such debts may create voidable preferences under the applicable insolvency law.[249]

---

[245] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (i) 1 h 21 = p. 679.
[246] For conditions under English law see G.H. Treitel, An Outline of the Law of Contract, 4th ed. (London 1989), Chapter 2 12 = p. 24.
[247] Under English law the effect of a condition precendent depends on the construction; either (1) the parties are not bound at all until the event occurs (Pym v Campbell (1856) 6 E & B 370), or (2) the parties are not bound by the main agreement but must not do anything to prevent the occurrence of the event (Mackay v Dick (1881) 6 App Cas 251) or (3) one party is bound to do its best to bring about the event (Re Anglo-Russian Merchant Traders [1917] 2 K B 679); see G.H. Treitel, An Outline of the Law of Contract, 4th ed. (London 1989), Chapter 2 12 = p. 24. All these types of conditions precedent have the same effect on the secured debt for the purpose of security law: the secured debt is treated like a future debt.
[248] For future debts see chapter 8.2.1.4.
[249] *Actio Pauliana* or *actio revocatoria*; see Jan Hendrik Dalhuisen, Security in Movable and Intangible Property. Finance Sales, Future Interests and Trusts in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E.

English law also allows to take security to secure **future debts**, i.e. debts which are not yet in existence at the time of creation of the security interest. The taking of security over future debts was an issue under English law. Under the old rule of Hopkinson v. Rolt,[250] according to which tacking of further advances was not permitted without the consent of the second mortgagee, was modified by section 94 of the Law of Property Act 1925[251]. Any mortgagee, whether legal or equitable, can now make further advances ranking in priority to a subsequent mortgagee within the limitations of that provision.[252]

8.2.1.5 Debts governed by local or by foreign law

Secured debts under English law can be governed either by local or by foreign law. However, the question whether a debt governed by foreign law is created, due and payable is not a matter of English law but a matter for the applicable law under the rules of conflict of laws. The question which law governs the secured debt is determined ultimately by the conflict of laws rules of the *forum*, i.e. the country in which proceedings are brought.[253] Sometimes foreign law can apply even between nationals from the same jurisdiction; this is the case where the national conflict rules of contract law allow freedom of choice of law without a need of a relationship to a foreign country.[254] In most cases the parties will avoid any uncertainty about the law governing the secured debt by **choosing the applicable law**.[255] Given the propensity of documents used in the international capital markets to chose English law,[256] the secured debt will often be governed by English law where it arises

---

du Perron and J.B.M. Vranken (eds.), Towards a European Civil Code (Nijmegen, Dordrecht 1994), pp. 361-89 (363).

[250] (1861) 9 HL Cas 514.

[251] For registered land see section 30 of the Land Registration Act 1925.

[252] See Roy Goode, Commercial Law, 2nd ed. (London 1995), 24 3 (iii) = p. 708.

[253] The conflict rules of the forum may in turn refer to the conflict of law rules of another country; see for this so-called phenomenon of "renvoi" from an English law perspective J.G. Collier, Conflict of Laws (Cambridge, New York, New Rochelle, Melbourne, Sydney 1987), chapter 3 = pp. 21-9.

[254] See art. 3 (3) Convention on the law applicable to contractual obligations of 19 June 1980 (Rome Convention) which was adopted by the member states of the European Union (European Economic Community as it then was); see also the comment by Mario Giuliano and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations in OJ 1980 No C 282, pp. 1-42 (18). In England the Convention was adopted by way of the Contracts (Applicable) Law Act 1990.

[255] See art. 3 (1) Rome Convention.

[256] See Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Projekte und Projektfinanzierung (Munich 2001), chapter 6.1 = pp. 175-6; Ravi Tennekoon, The Law and Regulation of International Finance (London 1991), p. 24.

out of an international financial transaction like an international loan or an international bond.[257] Where a choice of law is not made by the parties the governing law will have to be determined with the help of **subsidiary rules.**[258]

8.2.1.6 Validity and enforceability of the secured debt

Under English law the secured debt must, for the security interest to be enforceable, created, valid, due, payable and enforceable.

8.2.1.7 Advance

For a security interest to attach (i.e. to be created as between the parties) under English law it is not sufficient to have an existing debt obligation. The attachment requires that value has been given, i.e. an actual advance has been made under the debt obligation.[259] Hence, it is not sufficient for an attachment to have a debt; what is needed is indebtedness. Value is in principle provided in money or money's worth. However, it is also possible to provide value by benefit in kind.[260] Value is in principle given in the form of **new** value, i.e. at the time of or subsequent to the security agreement and in consideration of the security.[261] However, where a security agreement has crystallised into a transfer of title (as in the case of a mortgage) or a delivery of possession (as in the case of a pledge or a contractual lien) the security attaches if given for a **past** consideration.[262] Such a security interest is, however, inherently weaker than one based on new value since it is subject to the provisions on avoidance in insolvency proceedings, according to which a security interest given during the run-up to bankruptcy or winding-up can be set aside if no new value was

---

[257] See for the definition of 'international' in this context Ravi Tennekoon, The Law and Regulation of International Finance (London 1991), pp. 1-5.

[258] See art. 4 Rome Convention.

[259] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 6 = p. 662; 23 2 = p. 678; 23 2 (iv) = pp. 683 f.; 23 3 (iii) = pp. 687 f.

[260] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iii) = pp. 687 f.

[261] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iii) = p. 687.

[262] *Ibd.*; Goode refers to "ownership" instead of title. This view may be contested on the basis of the fundamental principle of English law that past consideration does not support a current contract. On the basis of this principle it may be argued that security interests can only secure present debts and, therefore, if a pre-existing debt shall be secured the loan has to be withdrawn and then be created again. However, this view does not distinguish clearly enough between two different contractual relationships: the secured debt created

given for it. Interestingly, past indebtedness can become converted into new value by the rule in Clayton's Case[263] if there is an overdraft facility on a current account. According to this rule the earliest debit item is to be deemed settled first. This effectively washes the account with new money.[264]

The requirement of an actual advance under English law leads to an interesting result: security for outstanding debt under a current account or a revolving credit facility[265], which has been repaid, ceases to attach and switches into an inchoate status.[266] This does not mean that the creditor would loose the priority of his security interest upon repayment. Once new value is given the security interest attaches again and will possess the same priority it had initially. The constant changes in the status of the security interest have lead to the question whether in effect the creditor holds one single interest or whether each new attachment creates a new security interest. Since the priority of the security interest for each new attachment remains the same, the security interest must be one and not several.[267]

The requirement of advances is relevant for both present and future debts. It also follows that a mere contingent obligation (e.g. one that is given by a surety or a debt under a condition precedent) is insufficient to effect an attachment. The security interest remains inchoate as long as there is no advance being made.[268]

8.2.2 American law

8.2.2.1 Debts

---

by one contract and the security interest created by another contract. It is well possible under English law that security secures a debt under which consideration has been given in the past.

[263] Devaynes v. Noble, Clayton's Case (1816) 1 Mer 572.

[264] See for more details Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iii) = pp. 687 f.

[265] For the analysis of a revolving credit facility under English law see Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 2 (ii) = p. 640.

[266] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (iv) = pp. 683 f.

[267] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (ii) = p. 686.

[268] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (iv) = p. 684; the example of a debt under a condition precedent has been added by the author.

A "security interest" under Article 9 UCC secures "payment or performance of an obligation".[269] Hence, a security interest may not only secure monetary obligations but also other obligations. A monetary obligation can be documented in an instrument. Documentary debts are debts which are supported by an additional debt arising out of an instrument. Typical examples are, like under English law, bills of exchange, promissory notes and cheques. In American secured transactions law the term "chattel paper" refers to a document which evidences both a monetary obligation and a security interest (or a lease).[270]

Under Article 9 UCC – like under other legal systems – a distinction between a person giving a security interest and a debtor exists although only the "debtor" is referred to throughout the text. The person owing "payment or other performance of the obligation embodied in the security agreement whether or not that party owns or has right in the collateral [...]" is the debtor.[271] "Where the debtor and the owner of the collateral are not the same person, the term 'debtor' means the owner of the collateral in any provision of the Article [i.e. Article 9 UCC] dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires".[272]

8.2.2.2 Monetary and non-monetary obligations

As was already pointed out US-American law recognises that security interests can secure monetary obligations as well as other obligations.[273] However, in practical terms security interests secure predominantly monetary obligations.

8.2.2.3 Unconditional and conditional debts

Under US-American law both unconditional and conditional obligations can be secured.

---

[269] § 1-201 (37) first sentence UCC.
[270] See § 9-102 (a) (11) UCC. It may be compared to the debenture under English law.
[271] See the definition in § 9-105 (1) (d) UCC old version. The new version in § 9-102 (a) (28) UCC is less succinct.
[272] *Ibd.*
[273] See e.g. § 1-201 (37) first sentence UCC.

8.2.2.4 Present and future debts

Under Article 9 future obligations, so-called "future advances" can be secured by a security interest.[274] Future advances are covered if the security agreement between debtor and creditor includes a future advances clause. Such future advances clauses are in principle only struck down if they are so-called "dragnet clauses". This is the case if the secured creditor takes the assignment of a third party unsecured debt and then relies on the future advances clause in order to enforce this debt against the charged property.[275] Future advances can be covered not only by the initial security agreement but also by a later agreement.[276] Future advances clauses are often combined with after-acquired property clauses.[277] The first-to-file-or-perfect rule according to which the ranking of a security interest is determined by the time of its filing[278] extends also to future advances.[279]

8.2.2.5 Debts governed by local or by foreign law

Both obligations governed by local or by foreign law can be secured under US-American law. It should also be remembered that the US civil law is state law. Hence, the term "foreign law" relates not only to non-US law but also to state laws other than the law of the state which governs the obligation.

8.2.2.6 Validity and enforceability of the secured debt

Under US-American law the secured obligation must, for the security interest to be enforceable, be created, valid, due, payable and enforceable.

8.2.2.7 Value

---

[274] See § 9-204 (c) UCC.
[275] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 55.
[276] *Op. cit.*, p. 65; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston Mass. 1993) (loose-leaf), 2.09 [6]; 10.01 [3].
[277] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 65.
[278] §§ 9-317 (a) (1), 322 UCC.

Similar to English law which requires for the attachment of a security interest that an advance has been made, American law requires that the secured creditor has given value.[280] The notion of "value" is defined further in § 1-201 (44) UCC. According to this provision a person gives "value" for rights if he acquires them (1) in return for a binding commitment to extend credit; (2) as security for or in total or partial satisfaction of an antecedent debt; or (3) in return for any consideration sufficient to support a single contract. "Consideration" (case [3]) as understood in contract law is sufficient as "value". It follows clearly from § 1-201 (44) UCC (see case [2]) that a security interest also attaches if it is created for an already existing debt. Hence, there is no requirement for **new** value under American law. Since there is no requirement for new value it is of interest to which degree the creditor must be committed (cases [1] and [2]). A question arises in particular if the secured party has not disbursed funds but has an obligation to do so under a security agreement or loan agreement that contains a number of conditions on the disbursement, such as a "material adverse change" (MAC) clause. The issue whether or not there is a sufficiently binding commitment to give value for the purposes of Article 9 UCC will depend on the extent of the conditions and the unilateral power of the party to trigger them.[281]

8.2.3 German law

8.2.3.1 Debts

As we have seen Anglo-American legal systems often refer to "secured debts". However, it is common among continental legal systems to refer to "secured claims". Also German law does not refer to "secured debts" but rather to "secured claims". However, claim and debt correspond to each other and both terms only signify a difference in perspective. Therefore, since debt and claim are only two sides of the same coin the reference to either debt or

---

[279] § 9-322 (b) (1) UCC; Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 65

[280] § 9-203 (b) (1) UCC; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston Mass. 1993) (loose-leaf), 2.03.

[281] Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston Mass. 1993) (loose-leaf), 2.03.

claim in the context of different national security laws is only a difference in terminology but not in substance.

A claim under German law is a right *in personam* and hence the right to ask from someone to perform an act or an omission.[282] Security interests under German law secure in practice almost exclusively monetary debts. This can be shown at the example of German security interests in moveable property. The retention of ownership ("*Eigentumsvorbehalt*") secures the purchase price under a sales contract which is deferred by the vendor, i.e. a typical form of credit for goods. The security transfer of ownership ("*Sicherungsübertragung*") secures loan obligations, i.e. a typical form of money credit.[283]

A debt can be documented in an instrument. Documentary debts are debts which are supported by an **additional debt** arising out of an instrument.[284] Such debts can also be secured by a security right under German law. This is confirmed explicitly in §§ 1187-1189 BGB for accessory land mortgages. Such accessory land mortgages must take the form of a strict land mortgage ("*Sicherungshypothek*") for which the application of § 1138 BGB is excluded.[285] Special provisions for documented debts exist also among the provisions for pledges on other rights (§§ 1292-1296 BGB). However, the instruments referred to in these provisions are charged property and do not document a secured claim.

8.2.3.2 Monetary and non-monetary obligations

The distinction between money credit and credit for goods is important since it is reflected in the type of security interest which is used for securing the credit. The pledge on movable things or receivables (§§ 1204 [1], 1228 [2] second sentence BGB) and the pledge on other rights (§§ 1273 [2] first sentence, 1204 [1], 1228 [2] second sentence BGB) secure either

---

[282] § 194 (1) BGB and Dieter Medicus, Schuldrecht I. Allgemeiner Teil. Ein Studienbuch, 13th ed. (Munich 2002), § 1 II 1 = p. 3.

[283] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 1 I 1 b = pp. 23 f. It should be noted that a loan contract under the old version of § 607 (1) BGB was not necessarily limited to the transfer of money; cf. Wolfgang Fikentscher, Schuldrecht, 8th ed. (Berlin, New York 1992), no. 844. However, since the reform of the BGB's provisions on contract law which took effect in 2002 the act distinguishes between money loans (§ 488 [1] first sentence BGB) and a loan of things (§ 607 [1] first sentence BGB).

[284] Alfred Hueck and Claus-Wilhelm Canaris, Recht der Wertpapiere, 12th ed. (Munich 1986), pp. 29-35.

monetary claims or claims which can translate into a monetary claim until a sale in enforcement proceedings at the latest.[286] Only monetary claims denominated in local currency (i.e. Euro) can be secured debts under an accessory land mortgage (§ 1113 [1] BGB). This has to be registered in the land register ("*Grundbuch*").[287] Hence, securing a single natural obligation by way of an accessory land mortgage ("*Revenüenhypothek*") is not possible.[288] Debts denominated in a foreign currency can be secured by accessory land mortgages if they are translated into German currency.[289] A denomination in foreign currency or monetary units of account is not possible. Any type of claim can be secured by a non-accessory land mortgage (§ 1191 [1] BGB), either in the form of a simple non-accessory land mortgage or a non-accessory land mortgage by way of security, or a non-accessory annuity land mortgage since these security rights are not dependent on a claim in the first place.

Pledges, retentions of ownership and security transfers of ownership can secure foreign currency claims.[290] Such foreign currency claims can be both "unechte Valutaschuld" pursuant to § 244 BGB or "echte Valutaschuld".[291] Albeit for the aforementioned security rights the creation and payment of foreign currency claims is possible under security law, there can be restrictions under applicable contract and currency law.[292]

8.2.3.3 Unconditional and conditional debts

---

[285] See chapter 10.2.3 below.

[286] See e.g. for pledges on movable things § 1228 (2) second sentence BGB; such translation can occur pursuant to §§ 280-283 BGB; see Baur and Stürner, Lehrbuch des Sachenrechts, 16th ed. (Munich 1992), § 55 B II 2 c = p. 593; Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1204 no. 6.

[287] This does not follow from § 1115 (1) BGB but from § 28 second sentence GBO; Baur and Stürner, Lehrbuch des Sachenrechts, 16th ed. (Munich 1992), § 37 II 2 c = p. 378.

[288] Philipp Heck, Grundriß des Sachenrechts (Tübingen 1930), § 23 7 = p. 90.

[289] Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), vor § 1113 no. 7; see for foreign currency obligations Helmut Heinrichs in Palandt, *ibd.*, § 245 nos. 11-17.

[290] § 1204 (1) BGB (the opening provision of the provisions on pledge) does not exclude this possibility. Retention of ownership and security transfers of ownership are practically unregulated by the German Civil Code.

[291] See for foreign currency claims Helmut Heinrichs in Palandt, BGB, 62th ed. (Munich 2003), § 245 nos. 11-17.

[292] See Dieter Medicus, Schuldrecht I. Allgemeiner Teil. Ein Studienbuch, 12th ed. (Munich 2000), § 18 III 1 = p. 90.

Claims secured by pledges or accessory land mortgages can be conditional.[293] This is stated in § 1204 (2) second sentence BGB for pledges and in § §1113 (2) second case BGB for accessory land mortgages. The effect of conditions is, however, different for pledges and accessory land mortgages. Whilst the pledge is created (i.e. attaches and is perfected) even if it secures a claim under a condition **precedent,**[294] an accessory land mortgage securing a claim under a condition precedent is created only as a non-accessory land mortgage for the benefit of the owner ("*Eigentümergrundschuld*") pursuant to §§ 1163 (1) first sentence, 1177 BGB. A pledge for a claim under a condition **subsequent** ceases upon occurrence of the condition pursuant to § 1252 BGB.[295] However, a non-accessory land mortgage securing a claim under a condition subsequent transforms into a non-accessory land mortgage for the benefit of the owner if the condition occurs.

Non-accessory security rights (such as retention of ownership, security transfer of ownership or non-accessory land mortgage) can equally secure conditional claims but are, for the purposes of their creation, by definition independent from the secured debt.

Under German law the rules applicable to conditions (§§ 158-162 BGB) apply also to **time limits** (§ 163 BGB). The rules relating to conditions precedent apply to a *dies a quo* ("*Anfangstermin*"), the rules relating to conditions subsequent apply to a final date ("*Endtermin*"). The difference between a condition and a time limit under German law is that in the former case the event is uncertain whereas in the latter case the event is certain.

---

[293] For conditions under German law Dieter Medicus, Allgemeiner Teil des BGB, 8th ed. (Heidelberg 2002), no. 828.

[294] Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1204 no. 8; a different opinion is held by Stefan Rüll, Das Pfandrecht an Fahrnis für künftige oder bedingte Forderungen gemäß § 1204 Absatz II BGB (diss. Munich 1986). This opinion must, however, be rejected. It does not take into account that the creation of a pledge is not accessory to the existance of a claim (i.e. there is no "Entstehungsakzessorietät") which can be deducted from § 1209 BGB (which, however, deals explitely only with priority issues). There is no indication for a later creation of the pledge from § 1204 (2) BGB ("das Pfandrecht kann [...] bestellt werden"). Provisions like §§ 1163 (1), 1177 BGB are missing for the pledge. In addition, the pledgor is protected since he can raise a defence from the secured debt against any enforcement proceedings; see further Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), pp. 286-308.

[295] Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), p. 269 holds that § 1204 (2) BGB applies only to conditions **precedent**. There is no such suggestion in the wording of § 1204 (2) BGB but Becker Eberhard's proposed teleological reduction ("teleologische Reduktion") can be supported. It is obvious anyhow that a pledge can be created for an existing debt (even if it may terminate under a condition subsequent).

8.2.3.4 Present and future debts

Pledges can also secure future debts (§ 1204 [2] first case BGB). The same applies to accessory land mortgages (§ 1113 [2] first case BGB). As far as the time of creation of the security right is concerned the same principles apply as for secured debts under a condition precedent. Whilst the pledge is created immediately with completion of the creation requirements,[296] the accessory land mortgage is only created with the secured claim becoming existent. During the interim period a non-accessory land mortgage for the benefit of the owner exists pursuant to §§ 1163 (1), 1177 BGB.[297]

Non-accessory security interests (i.e. retention of ownership, security transfer of ownership and non-accessory land mortgage) are, for the purposes of their creation, by definition independent from the secured debt.

8.2.3.5 Debts governed by local or by foreign law

Security rights under German law can secure both claims governed by local or by foreign law. The determination of the law applicable to the secured debt is a matter for the conflict of laws rules of the *forum*, i.e. the country in which proceedings are brought.

8.2.3.6 Validity and enforceability of the secured debt

For the security right to be enforceable the secured claim must be created, valid, due, payable and itself enforceable but only where the security right is an accessory one. However, often a security agreement ("*Sicherungsabrede*") creates a link between non-accessory security right and secured debt.

---

[296] § 1209 BGB; Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1204 no. 8; Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 6 II 4 = p. 101; a different opinion is held by Stefan Rüll, Das Pfandrecht an Fahrnis für künftige oder bedingte Forderungen gemäß § 1204 Absatz II BGB (diss. Munich 1986) (see footnote 294).

[297] Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1113 no. 17; see in more detail Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), pp. 286-308 (for pledges) and pp. 308-315 (for accessory land mortgages).

8.2.3.9 Value

Under German law it is in principle sufficient as a matter of security law that the claim is created for an accessory security right to become created as well. However, there was until recently a situation in which value mattered. The **accessory land mortgage** becomes only created once the claim secured becomes existent. Typically the secured claim will be a loan obligation. In principle contracts under German law are consensual contracts ("*Konsensualverträge*") which are formed by agreement between the parties only. Curiously a loan under German law was a "real contract" ("*Realvertrag*"), a remnant of Roman law. Real contracts, different from consensual contracts, become only formed once the agreed consideration has been given.[298] Hence, an accessory land mortgage was not created until a money loan was paid to the debtor ("*Valutierung der Forderung*") because the loan agreement itself was not formed before such payment. The **owner** of the real estate subject to the accessory land mortgage holds under such circumstances a non-accessory land mortgage for the benefit of the owner.[299] However, the **creditor** has no right at all. For this situation doctrine and case law helped with an expectancy right ("*Anwartschaftsrecht*") for the benefit of the creditor.[300] This expectancy right is not necessary any longer since German contract law was reformed with effect of 1 January 2002. The money loan (§ 488 [1] first sentence BGB) and the loan of things (§ 607 [1] first sentence BGB) are now both consensual contracts. A claim arises with the agreement of the parties and with no further need to give consideration.

It should be noted that the issue of value did not arise with respect to **pledges in movable things or rights** which are equally accessory. For pledges there is no provision similar to § 1163 (1) first sentence BGB.[301]

---

[298] See for loans before the recent reform of the BGB's provisions on contract law took effect Hans Putzo in Palandt, BGB, 62th ed. (Munich 2003), Einf v § 607 no. 2; the leading opinion in German doctrine held, however, that such a consideration is not necessary for the formation of a loan contract, i.e. that the loan is a consensual contract.

[299] §§ 1163 (1) first sentence, 1177 BGB.

[300] Dieter Medicus, Bürgerliches Recht. Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung, 15th ed. (Köln, Berlin, Bonn, Munich 1991), no. 460; Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1163 no. 7.

8.2.4 Model Law on Secured Transactions

8.2.4.1 Debts

Under the model a charge secures debts. A "debt" is an obligation between two persons pursuant to which one person has to perform an action or an omission.[302] In the context of security law the most important debts are payment obligations.

Under the model law the secured debt can be documented in an instrument.[303] Equally other rights can be dependent on the secured debt. This is clarified in particular for debts for which security has been created (see art. 12.6). A debt may be private or public in nature. Public debts are those which are owed to public bodies. A typical example are taxes. Such public debts can be secured within the limits set by the rules governing the relationships with public bodies, i.e. public law.

The secured debt must be owed to the chargeholder (art. 3.1 of model law), i.e. it must be its creditor. Chargor and debtor must, however, not be the same person (art. 4.3.1).

8.2.4.2 Monetary and non-monetary obligations

In principle a security right secures a debt whose contents is a payment obligation, i.e. a **monetary obligation**. This is clear for the model law where a charge "must be capable of expression in money terms" (art. 4.2 first sentence). In addition, under the model law a charge is not immediately enforceable until there is a failure "to pay" the secured debt (see art. 22.1). The model law allows not only to express the monetary obligation by reference to the local currency but also by reference to a foreign currency or as multi-currency

---

[301] Dieter Medicus, Bürgerliches Recht. Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung, 15th ed. (Köln, Berlin, Bonn, Munich 1991), no. 461.

[302] The model law, therefore, uses the term "debt" in a wider sense than it is understood under English law; see 7.2.1 above.

[303] See reference to documented debts in arts. 17.4 and 21.2.6.1; however, negotiable instruments are under these provisions charged property and they are not referred to as instruments documenting a secured debt.

debt.[304] Alternatively, the monetary obligation can be expressed by reference to other monetary units of account.[305]

The charging instrument and the registration statement (and the corresponding registration) may indicate that the secured debt must be paid in a specified currency other than the currency in which the sum payable is expressed.

Some laws allow not only to secure monetary but also **non-monetary obligations**. Under the model law this is limited to those cases where the obligation is "capable of expression in money terms" (art. 4.2 first sentence).[306] Hence a non-monetary obligation can only be secured if it can be translated into a money obligation (art. 4.2 second sentence). This may accommodate e.g. suretyships and guarantees which at the time they are agreed upon may under local law only be potential or contingent payment obligations. Also covered is the case of an obligation to provide services the violation of which can result in claims in damages.[307] The novation of an obligation will, however, not suffice as it creates a new obligation and does not "translate" the same one. Before the translation occurs the security will not be enforceable (for the model law see art. 4.2 second sentence).[308] The translation can occur in accordance with the terms of an agreement, by operation of law or by court order.[309] Such translation must occur at the latest at the time of enforcement, since otherwise the charge will not be enforceable.[310]

8.2.4.3 Unconditional and conditional debts

A conditional or contingent debt is one which is dependent on an event the occurrence of which is uncertain. The model law has clarified in art. 4.3.4 first alternative that a conditional debt can be secured by a charge. Conditions may be in the form of conditions

---

[304] See art. 4.2 first sentence.
[305] Art. 4.2 first sentence.
[306] See also the similar wording in § 1228 (2) BGB.
[307] Tort claims arising out of the non-performance other than for breach of contract should, however, not be covered.
[308] It should, however, be noted that under the model law default must not necessarily be with the monetary obligation. This is relevant for corporate financings (see chapter 8.2.1.2 above).
[309] For contractual obligations other than a debt under the model law see further art. 14.3.
[310] Arts. 4.2 second sentence, 14.4, 22.1.

precedent or conditions subsequent. A **condition precedent** in principle delays the validity of an agreement. A debt under a condition precedent is not valid until the condition has been met. Such a debt should be treated like a future debt; in particular it should give the chargeholder immediate priority once the condition has occurred. A **condition subsequent** in principle renders an agreement subsequently. A debt under a condition subsequent becomes invalid with the occurrence of the condition subsequent and, therefore, terminates. Like in any case of termination of an individual debt the effect of the termination on the grounds of a condition subsequent will depend on the description and identification of the secured debt by the parties.

8.2.4.4 Present and future debts

The model law does not explicitly refer to **present** debts. It clearly highlights that a charge can be taken to secure future debts and, therefore, implicitly includes the standard case that a charge secures a present debt.

The model law refers explicitly to **future** debts in art. 4.3.4 second case. The possibility of securing future debts raises the question at which time security is created. The most obvious alternatives are that the security right is either created immediately or only when the secured debt comes into existence. Since the charge under the model law is dependant upon the secured debt one should assume that a charge cannot be created without an existing secured debt. However, under the model law the fact that a secured debt is a future debt does not postpone the time of creation of the charge. The charge is created immediately provided that the debt is identified (see art. 4.4). Art. 6.5.3 confirms that a future debt does not prevent the immediate creation of the charge.[311]

Albeit a charge securing a future debt is created immediately it should be noted that for a future debt there can be no failure to pay under art. 22.1. Hence, the charge does not

[311] The reference in art. 6.5.3 to art. 4.2 is not intended to exclude this.

become immediately enforceable.[312] If the chargeholder enforces the charge with respect to a future debt the chargor can, therefore, prevent enforcement for this debt.

8.2.4.5 Debts governed by local or by foreign law

Secured debts can be governed by local or foreign law (see explicitly art. 4.3.3).

8.2.4.6 Validity and enforceability of the secured debt

Since under the model law the charge is dependent on the secured debt[313] any defence against the secured debt can also be raised against the charge.[314]

8.2.4.7 Advance

Under the model law there is no need to make an advance for the charge to become created. However, art. 22.1 clearly indicates that an advance must have occurred under a monetary obligation some time between its creation and its enforcement. For non-monetary obligations, however, it is sufficient that at some stage they become translated into monetary obligations (art. 4.2 second sentence) and that at the time of enforcement there is a failure to pay under the monetary obligation (art. 22.1)

8.3 Legal principles

8.3.1 Analytical principles

8.3.1.1 General principles

The two poles between which the legal framework of the contents of the secured debt can oscillate are the principle of maximum freedom ("*Freiheitsprinzip*") and the limitation

[312] The chargeholder can however not claim that the debt has not yet been created (arts. 14.1, 6.5.3). This argument is excluded by art. 4.3.4 second case.
[313] See chapter 10.2.4.
[314] Art. 14.3.

principle ("*Begrenzungsprinzip*"). Under the principle of maximum freedom the parties have freedom of contract, i.e. all types of debts can be secured (which provides flexibility to the parties), and freedom of choice of law with respect to the underlying secured debt. In other words, the parties have maximum flexibility to agree what debt should be secured by the charge. Under the limitation principle there are certain restrictions on the types of debts which can be secured. Some countries only allow debts related to the purchase of goods (including loans granted for this purpose) whereas others also allow the securing of some other debts; a third group of countries, however, does not restrict the nature of the debt to be secured.[315] Some restrictions may arise from public law where the parties want to secure a public debt.

Between these two poles legal systems will lean either towards the principle of maximum freedom or the limitation principle. Generally, the discussion of the legal systems in this chapter has demonstrated that with respect to the contents of the secured debt they all lean towards the freedom principle. This is hardly surprising since (1) the examined legal systems are all working in or designed for (the latter applies to the model law) advanced market economies, (2) the contents of the secured debt is a very fundamental issue of security law which allows for little variation and (3) contract law features a relatively high degree of uniformity if one compares legal systems (this cannot be said e.g. of security law as far as its proprietary aspects are concerned).

8.3.1.2 Debts

8.3.1.2.1 General remarks

A debt can have various properties which should as a rule not affect its use as a secured debt in the context of security law. First, a debt may arise from a **contract** or by **operation of law**. Tort claims are typical examples for debts which come into existence by operation of law. It is well possible that parties want to secure their performance by creating a security right. Second, a debt can be **documented** in an instrument. Documentary debts are

[315] "Study on security interests" and "Legal principles governing security interests (study prepared by Professor Ulrich Drobnig of Germany) in UNCITRAL Yearbook vol. VIII, 1977, part two, II, A), 2.3.2.2 = p.

debts which are supported by an additional debt arising out of an instrument. Typical examples are bills of exchange, promissory notes and cheques. Third, a debt can arise from either **private** or **public law**.[316] Lastly, a debt can be linked to a **dependent** right and depend on it for example for its creation.[317] This is the case e.g. for guarantees, where the guarantee is dependent on the debt it secures (*"Bürgschaft"* pursuant to § 765 BGB under German law).

8.3.1.2.2 Specific remarks

The legal systems examined in this study demonstrated few differences, apart from the **terminological division** that they refer either to a "debt" (English law as well as the model law), an "obligation" (US-American law) or a "claim" (German law). Most remarkable is the existence of security rights under German law which have no direct relationship (i.e. one founded not merely on a separate security agreement but in the security right itself) to a secured claim at all. These rights are called **"non-accessory" security rights** under German law. In particular the non-accessory land mortgage, either in the form of a simple non-accessory land mortgage or a non-accessory land mortgage by way of security, has no direct links to a secured claim. Arguably the retention of ownership and security transfers as well as security assignments under German law are non-accessory in that they have no direct link to a secured claim. Such non-accessory security rights could not be observed under the other legal systems.[318]

The other notable distinction is with respect to specific forms of **documented debts**. English law featured the debenture, American law the chattel paper and German law even had special provisions for certain types of security interest in documented claims. The model law did not contain any references to specific forms of documented debts because it has to leave references to peculiarities of national law to the national laws which will implement or have already implemented the model law.

177.

[316] See chapter 8.2.4.1.

[317] For the aspects of dependence between security and secured debt see chapter 10 below.

[318] However, where legal systems allow a retention of title or a security transfer of title or a security assignment (e.g. English law) they also recognise non-accessory security unless non-accessoriety is excluded by way of the security being conditional upon satisfaction of the secured debt.

8.3.1.3 Monetary and non-monetary obligations

8.3.1.3.1 General remarks

In principle a security interest secures a debt whose contents is a payment obligation, i.e. a **monetary obligation**. The contents of a monetary obligation is often defined by reference to the principle of nominalism. Hence a monetary obligation involves the payment of so many chattels, being legal tender at the time of payment, as, if added together according to the nominal value indicated thereon, produce a sum equal to the amount of the debt.[319]

Monetary obligations are often expressed in national **currency**. Some laws allow, however, an expression also in a foreign currency or multi-currency debts. The latter case might include the possibility of a multi-currency loan option in a loan agreement. Monetary obligations can sometimes not only be expressed by reference to a local (or foreign) currency but also by reference to other[320] **monetary units of account**. Such monetary units of account can be established by intergovernmental institutions or by agreement between two or more states.[321] Typical examples are the European Currency Unit (ECU) of the European Union and the Special Drawing Rights (SDR)[322] of the International Monetary Fund. The purpose of such units is to represent a unit of account; payment obligations cannot be based on them.[323]

A distinction must be made between (1) the currency or monetary unit of account in which the secured debt must be expressed and (2) the currency (not the monetary unit of account)

---

[319] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), p. 84.

[320] Units of account are the one characteristic feature of a monetary system; see F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 42-61.

[321] See definition in art. 5 lit. 1 of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes (UNBC).

[322] See F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 507-9.

[323] Helpful is, therefore, the rule in art. 75 (2) of the UNCITRAL Convention on International Bills of Exchange and International Promissory Notes: "If the sum payable is expressed in a monetary unit of account [...] and the monetary unit of account is transferable between the person making payment and the person receiving it, then, unless the instrument specifies a currency of payment, payment shall be made by transfer of monetary units of account. If the monetary unit of account is not transferable between those persons, payment shall be made in the currency specified in the instrument or, if no such currency is specified, in the currency of the place of payment."

in which it is payable.[324] Each question may even be governed by a different law under the rules of conflict of laws.[325]

Some laws allow not only to secure monetary but also **non-monetary obligations**. Normally, however, laws require the translation of a non-monetary obligation into a monetary one for the security interest to become enforceable.

8.3.1.3.2 Specific remarks

The position with respect to monetary and non-monetary obligations is most clearly expressed by American law under which the "payment or performance of an obligation" can be secured. All legal systems examined in this study provide that **monetary obligations** can be secured by a security interest. By this they provide security for two forms of credit: loan credit and sale credit.[326] With respect to the **currency** or other monetary units of account in which the secured debt has to be expressed[327] the model law is the most liberal legal system. It explicitly allows monetary obligations (or non-monetary obligations which are translated into money obligations) to be expressed in national or foreign currency or any (other) monetary units of account or even a combination of these. Under German law accessory land mortgages must secure debts denominated in local currency. However, foreign debts can be secured by an accessory land mortgage if they are translated in local currency (which entails, however, currency risk for either the person giving security or the person receiving security).

Interesting issues arise with respect to **potential or contingent payment obligations** which arise e.g. under suretyships or guarantees.[328] According to **English law** for such an obligation a security interest cannot attach since there is no current obligation; any security

[324] See for this distinction F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 199-201; also art. 75 (3) UNCITRAL Convention on International Bills of Exchange and International Promissory Notes.
[325] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 200, 233 *et seq.*, 320 *et seq.*
[326] A third type of credit is the lending of credit itself ("*Kreditleihe*"). It occurs e.g. where a bank provides a guarantee. Guarantee obligations are often classified as contingent liabilities or future debts. As future debts they are capable of being secured.
[327] The issue in which currency a secured debt has to be paid must be distinguished from this issue; see chapter 7.3.1.6.

interest agreed between the parties remains inchoate security until such time that the debtor defaults.[329] Under the **model law** the drafters seem to have qualified contingent obligations as non-monetary obligations and thus the requirements of art. 4.2 first sentence apply (i.e. the obligations must be translated into a monetary obligation to become enforceable). In retrospect, the qualification under the model law as non-monetary obligations seems, in my opinion, is doubtful since a contingent liability under a guarantee can be understood as a monetary obligation which is, however, not due until certain conditions are fulfilled. In this sense a contingent liability is closer to a future or even a conditional debt than a non-monetary obligation. Whereas under English law and the model law there are restrictions for obligations created e.g. under guarantees and suretyships, **German law** takes a different position. A guarantee obligation is a present debt which can be secured by a security right. Clearly a payment claim cannot be raised and successfully enforced until the conditions set forth in the guarantee are fulfilled. However, this does not prevent such a debt from being a present debt.

The legal systems examined have also allowed for **non-monetary obligations** to be secured. The issue here is that legal systems often explicitly provide that a non-monetary obligation must be translated at some time before enforcement of the security right into a monetary obligation.[330]

8.3.1.4 Unconditional and conditional debts

All legal systems examined in this study allowed not only unconditional but also conditional debts to be secured. This shows again that all systems examined lean towards the freedom principle. There were differences between the legal systems examined when it came to classifying conditions. The dichotomy between conditions precedent and conditions subsequent as found under German law was not reflected in the same way e.g. under English law.

---

[328] As already mentioned above guarantees etc. create a third type of credit, the lending of credit itself ("*Kreditleihe*").
[329] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (iv) = p. 684.
[330] See e.g. German law (chapter 8.2.3.2) and the model law (chapter 8.2.4.2).

From the point of view of security law conditions **precedent** are critical because at the time of intended creation of the security right there is no valid and enforceable secured debt (similar to the situation with future debts). However, there is no question under the legal systems examined that debts under a condition precedent fully qualify as debts which can be secured by a security interest. For debts under a condition **subsequent** it should be noted that they are present debts and as such there is no doubt that they can be secured.[331]

The equation between conditions and **time limits** which was found under German law could not be discovered under other legal systems.

8.3.1.5 Present and future debts

Many secured debts will be in existence at the time of the creation of security and will be **present** debts in this sense. It may also be that **past** indebtedness is secured by a security interest, i.e. indebtedness that was created before the time of the creation of the security interest but that is still existing.[332] Both present debts and past debts (in the sense just defined) pose no issues with respect to creating security rights.

The situation was different with respect to **future debts**. However, as the situation under English law shows, the possibility of taking security to secure future debts is now firmly established. American and German law provide for security rights securing future debts in the respective acts. Equally the model law explicitly provides for this possibility. The possibility of securing future debts raises the question at which time security is created. The most obvious alternatives are that the security right is either created immediately[333] or only when the secured debt comes into existence.[334]

---

[331] For German law see Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), pp. 268-9.

[332] Jan Hendrik Dalhuisen, Security in Movable and Intangible Property. Finance Sales, Future Interests and Trusts in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. du Perron, J.B.M. Vranken (eds.), Towards a European Civil Code (Nijmegen Dordrecht 1994), pp. 361-89 (362); Jan Hendrik Dalhuisen, International Aspects of Secured Transactions and Finance Sales Involving Movable and Intangible Property in D. Kokkini-Iatridou and F.W. Grosheide (eds.), Eenvormig en Vergelijkend Privaatrecht 1994 (Lelystad 1994), pp. 405-46 (412).

[333] This is the situation under German law for possessory pledges securing future debts; § 1209 BGB; see also Peter Bassenge in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), § 1204 no. 8; Hansjörg Weber,

8.3.1.6 Debts governed by local or by foreign law

Each of the laws examined in this study allowed for the secured debt to be governed by either local or foreign law. With respect to conflict of laws issues a distinction must be made between (1) the currency or monetary unit of account in which the secured debt must be expressed and (2) the currency (not the monetary unit of account) in which it is payable.[335] Each question may even be governed by a different law under the rules of conflicts of law.[336]

8.3.1.7 Validity and enforceability of the secured debt

The secured debt must be valid and enforceable at least at the time of enforcement of the security pursuant to the applicable law (see explicitly the model law in art. 14.4). The debt should not be invalid because a required form was not complied with or should not have terminated. As the security right is often dependent on the secured debt[337] any defence against the secured debt can also be raised against the security right (for the model law see art. 14.3).

8.3.1.8 Advance

Advances or the giving of value are a prerequisite for the valid creation of a security interest under English and US-American law; they are not under the model law and German law[338] (a remaining requirement under German law disappeared with the recent reform of the German civil code). Strictest is English law which in principle requires the giving of new value in the form of money, money's worth or in kind. Past indebtedness will only

---

Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 6 II 4 = p. 101. The same applies to security interests under English and American law as well as charges under the model law.

[334] This is the situation for accessory land mortgages under German law where, however, a non-accessory security right ("*Eigentümergrundschuld*") exists in the interim.

[335] See for this distinction F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 199-201; also art. 75 (3) UNCITRAL Convention on International Bills of Exchange and International Promissory Notes.

[336] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 200, 233 *et seq.*, 320 *et seq.*

[337] See chapter 10 below for more details.

[338] There is clearly no direct requirement for value under German law for non-accessory security rights.

qualify as new value under the rule of Clayton's case which is applicable to security over current accounts. The requirement of new value can lead to a switching of security interests from an attached status to an inchoate status (very much like the accessory land mortgage under German law which can switch from an accessory land mortgage to a non-accessory land mortgage for the benefit of the owner). US-American law was less demanding on new value. It turned out that although value was required for the attachment of a security interest this requirement was only nominal; in particular it could be seen that a past indebtedness was fully sufficient to qualify as value.

8.3.2 Normative evaluation

8.3.2.1 General principles

An economically efficient security regime in the sense defined above,[339] i.e. a security regime which gives the creditor the remedies necessary to increase the amount of credit available in an economy, requires the implementation of the principle of maximum freedom with respect to the contents of the secured debt. The parties must be given freedom of contract and freedom of choice of law in respect to the underlying secured debt or, in other words, maximum flexibility to agree what debt should be secured by the charge.

The EBRD has formulated normative principles or fundamental rules of a modern secured transactions law which have to be adhered to in order to create a workable security regime.[340] With respect to the contents of a secured debt the EBRD has specified its general principles by way of the model law and it was already seen that the principle of maximum flexibility is implemented in the **model law** in a number of ways. First, there are generally no restrictions as to the type of debt which can be secured. Second, the secured debt may be a monetary or non-monetary obligation. Third, the secured debt can be unconditional or conditional. Forth, the secured debt may be contemplated in the future but not be incurred at the time of creation of the charge (art. 4.3.4). Fifth, the secured debt may be governed by local or foreign law (art. 4.3.3).

---

[339] Chapter 5.

8.3.2.2 Debts

As to the types of debt which can be secured under a national security law limitations must be avoided. The legal systems examined in this study were liberal with respect to the types of debt which could be secured.

8.3.2.3 Monetary and non-monetary obligations

Where local law allows only the expression of the secured debt for the purpose of security in the local currency even if the debt itself was paid in a foreign currency the risk-reducing function of security declines to the extent that the local currency declines relative to the currency in which the debt was paid. Albeit the creation and payment of a secured debt denominated in a foreign currency may well be possible under security law, there can be restrictions under applicable contract and currency law. Where parties meet such a limitation they will have to remedy the effects contractually in either of three ways.[341] (1) The problem can be met by providing for a maximum sum of the secured debt which provides room for such currency fluctuations. (2) It can also be dealt with by providing more security by the person giving security. (3) Lastly, the currency of the security agreement may be linked to a valuation clause. Such valuation clauses exclude the effects of nominalism most effectively but are sometimes prohibited by national laws which allow instead only to express debts with reference to a specific sum.[342] Since the risk-reducing function of security for the creditor declines with the extent of devaluation or inflation, the contractual ways to mitigate the risk reduction must be allowed. From the point of legislative policy the legislator should abide from legislation limiting contractual mitigants in particular in times of (inflationary or deflationary) crisis because parties will then have a real need for valuation clauses.[343]

---

[340] See Jan-Hendrik Röver and John Simpson, General Principles of a Modern Secured Transactions Law (London 1997); also Annex 2.
[341] Philip R. Wood, Comparative Law of Security and Guarantees (London 1995), no. 19-251.
[342] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), pp. 167-75; for the situation under German law see § 1 (1) first sentence Preisangaben- und Preisklauselgesetz under which the indexation of monetary obligations is prohibited; cf. also Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Handbuch Projekte und Projektfinanzierung (Munich 2001), chapter 6.2.6.6.2 (3) = p. 200.
[343] F.A. Mann, The Legal Aspects of Money, 4th ed. (Oxford 1982), p. 175.

8.3.2.4 Unconditional and conditional debts

It is particularly important that a security law recognises securing debts under a condition precedent. It helps to enhance the risk-reducing function of security if the scope of the law is kept broad with respect to the secured debt.

8.3.2.5 Present and future debts

Many secured debts will be in existence at the time of the creation of security and will be **present** debts in this sense. Sometimes debts may be created, due and payable before creation of the charge. Although such debts should not cause concern from the point of view of security law the securing of such debts may create voidable preferences under the applicable insolvency law.[344]

It is important that a security law also provides for the securing of **future** debts, i.e. debts which are created or become owed by the debtor after the creation of the security right. The possibility of securing future debts is necessary for a number of types of debts, for example current accounts and revolving credits. The securing of future debts is also essential for many modern financing techniques, e.g. cash flow based financings like project financings[345] or acquisition financings which make assumptions on future cash flows[346] and try to secure access to such cash flow by taking security over it. Security for future debts is hence an essential feature of a modern security law. It is sometimes criticised because it is said to endanger unsecured debts, may exclude security with a lower priority and may be preferential.[347] The first two objections can be met by introducing the requirement of a maximum amount for the secured debt. The problem that security over

---

[344] *Actio Pauliana* or *actio revocatoria*; see Jan Hendrik Dalhuisen, Security in Movable and Intangible Property. Finance Sales, Future Interests and Trusts in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. du Perron and J.B.M. Vranken (eds.), Towards a European Civil Code (Nijmegen, Dordrecht 1994), pp. 361-89 (363).

[345] Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Handbuch Projekte und Projektfinanzierung (Munich 2001), chapter 6 = pp. 153-241.

[346] For the assessment of risks see Peter L. Bernstein, Against the Gods. The Remarkable Story of Risk (New York, Chichester, Brisbane, Toronto, Singapore 1996).

[347] See Philip R. Wood, Comparative Law of Security and Guarantees (London 1995), no. 19-249.

future debts may be preferential is normally dealt with in the rules of voidable preferences of insolvency law.

The time when a security interest securing future debts is created can be either the time of realising the requirements for the attachment and perfection of a security interest (except for the creation of the debt) or the time of creation of the debt. It is clearly preferable to have the security right created immediately to avoid any intervening security rights. However, sometimes laws have chosen to set the time of creation of the security interest at the moment when the debt is created thus preventing intervening security rights.[348] Although a quite technical approach to the issue it leads to the necessary results.

8.3.2.6 Debts governed by local or by foreign law

It is important that security law allows to secure not only debts governed by local law but equally those by foreign law. This is of fundamental importance for any type of international financing where the credit agreements are often governed by English or New York law[349] and security is governed by the applicable local law under the governance of the *lex situs* rule. A limitation to debts governed by local law is, therefore, bound to prevent foreign financings and, hence, limits seriously security law's function to stimulate lending and investment.

8.3.2.7 Validity and enforceability of the secured debt

The requirements of validity and enforceability of the secured debt are a matter of legal technique. Whether or not validity and enforceability of the secured debt affect the security interest depends upon the approach chosen by a legal system for the relationship between secured debt and security interest.[350]

8.3.2.8 Advance

[348] This is the position under English law which requires in principle an advance but ranks new advances in priority to a subsequent mortgagee; see chapter 8.2.1.4.
[349] For project financing see Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Handbuch Projekte und Projektfinanzierung (Munich 2001), chapter 6.2.1 = pp. 175-6.

The issue of advances was found to be of diminishing importance. Only English law had kept this requirements in a meaningful sense, only mitigated by the rule of Clayton's case. Although the requirement of an advance seems to be neutral from an economic point of view it is nevertheless an unnecessary complication which should be avoided under a modern security law.

9 The extent of the secured debt

With respect to the secured debt we have to distinguish two components: the principal amount and any additional amounts. The **principal amount** is for example the amount of a loan extended to a debtor. In this example **additional amounts** will be interest, damages or enforcement costs, i.e. sums closely related to the secured principal amount, and other related sums. Albeit both principal amount and additional amounts taken together will form the secured debt it is helpful to distinguish between the two categories as we shall see.

9.1 Legal issue

We will deal here only with issues related to the extent of the secured debt as far as it is determined by the parties or by operation of law and not with the issues of description and identification of the secured debt.

9.2 Legal solutions

9.2.1 English law

9.2.1.1 Principal amounts

9.2.1.1.1 One or more debts

---

[350] See chapter 10 below.

Any security interest under English law can secure a single debt. However, English law goes even as far as permitting "all money's due and to become due clauses"[351] and cross-over security where all the chargor's present and after-acquired property is made to secure existing and future indebtedness.[352] Equally a retention of title can be extended into an all money's title retention clause.[353] Security can be taken for fixed sum credit and revolving credit.[354] Hence, English law is very liberal when it comes to the scope of the secured debt.

9.2.1.1.2 Maximum amount

Under English law in practice the amount of the debt secured usually is identified. However, since not only monetary debts but also non-monetary debts can be secured it is not necessary as a matter of law to identify an amount. There are no requirements as to agree a specific maximum amount between the parties.

9.2.1.1.3 Static and dynamic security

English law provides for dynamic security with respect to the secured debt by providing security interests for several debts (including a pool of debts) and for future debts (albeit limited by the requirements of sec. 94 of the Law of Property Act 1925 for mortgages).

9.2.1.2 Additional amounts

9.2.1.2.1 Agreement between the parties

Security under English law must not always secure a principal debt such as a repayment obligation under a loan agreement but can also secure related obligations. This is often provided for under security documents e.g. for project finance or leverage buy-out transactions.

---

[351] Roy Goode, Commercial Law, 2nd ed. (London 1995), 24 4 (ii) 2 b = p. 716; section 401 (1) (b) Companies Act 1985 is believed not to preclude such clauses.
[352] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iv) = pp. 688 f.
[353] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 1 d = p. 654.

9.2.1.2.2 Operation of law

Such additional obligations must, however, be covered by an agreement between the parties. Statute, common law or equity do not provide for other obligations to be secured by consensual security or reservation of title clauses.

9.2.2 American law

9.2.2.1 Principal amounts

9.2.2.1.1 One or more debts

Article 9 UCC refers to the secured debt in various contexts. E.g. it used to define a "debtor" under Article 9 UCC as a person who owes payment or other performance of the obligation secured.[355] It also deals with the issue of value or advances.[356] Lastly, the debtor can request confirmation of the amount of unpaid indebtedness.[357] Although the parties must clearly agree about the debt secured by a security interest, the Code is - apart from the few places mentioned - relatively silent about the secured debt. The Code does not require that a description and identification of the secured debt must be contained in the **security agreement**. Equally the Code does not require a description and identification of the secured debt in the **financing statement**.[358] Under American law even future advances must not be mentioned in the financing statement.[359] However, the parties are free to provide a description of the secured debt in the filing statement or to attach a copy of their security agreement[360] containing such a description. In practice the filing will allow a third party to check only whether or not a security interest in the debtor's property has been

---

[354] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 2 (ii) = pp. 639-40.
[355] § 9-105 (1) (d) UCC old version. Under § 9-102 (a) (28) (A) UCC new version it is not important any longer "whether or not the person [i.e. the debtor] is an obligor".
[356] §§ 1-201 (44), 9-102 (a) (68), 9-203 (b) (1) UCC; see chapter 8.2.2.7 above.
[357] § 9-210 UCC.
[358] § 9-502 (a) UCC; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 2.09 [6].
[359] See Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 10.01[5].

created. The filing alone will usually not allow the third party to determine the exact identity of the secured debt.[361] Although the Code provides, therefore, relatively little about the secured debt there is no doubt that a security interest can secure one or more debts.

9.2.2.1.2 Maximum amount

There are no requirements to define a maximum amount of the secured debt under American law.

9.2.2.1.3 Static and dynamic security

American law enables to create dynamic security with respect to the secured debt since several debts can be secured, future advances can be part of the secured debt and such security is not subordinate to security for present debt and the debt secured can constantly change in its extent.

9.2.2.2 Additional amounts

Like under English law obligations additional to the principal debt must be included in an agreement between the parties since they are not provided for by operation of law.

9.2.3 German law

9.2.3.1 Principal amounts

9.2.3.1.1 One or more debts

As far the extent of the secured principal debt is concerned German law follows in principle the **freedom principle**. This shall first be shown for security rights in **movables**. The

[360] § 9-402 (1) fifth sentence UCC old version; § 9-502 (a) UCC new version does not prohibit this practice; practitioners counsel, however, that "silence is the best policy" (Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 2.09 [6].

parties can even in the case of the **pledge** secure not only one debt but even a changing pool of debts as long as they take into account the principle of certainty ("*Bestimmbarkeitsgrundsatz*"). For example all present and future debts against a certain debtor or debts arising from an existing loan can be secured by a pledge.[362] The wording of the respective provision (§ 1204 [1] BGB: "*zur Sicherung einer Forderung*") is interpreted widely. However, § 356 HGB applies to secured debts, which are subject to a current account under commercial law.[363] § 356 (1) HGB clarifies that debts arising from a commercial current account do not terminate by recognition of the account's balance ("*Saldoanerkennung*"). They continue to form the base for the security rights they were created for.

In the case of a **retention of ownership** we have to distinguish between a simple and an extended form. The simple retention of ownership ("*einfacher Eigentumsvorbehalt*") secures the sales price, which is related to the good sold and transferred under the condition precedent that ownership[364] passes only upon payment of the sales price.[365] The retention of ownership extended to other debts, which is recognised by customary law, extends the security to additional debts.[366] The retention of ownership extended to other debts is agreed in a separate assignment agreement.[367] Often the parties agree upon a retention of ownership securing debts (i.e. the balance) arising from a commercial or civil law current

---

[361] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 59.

[362] Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1204 no. 8.

[363] Claus-Wilhelm Canaris, Handelsrecht, 22nd ed. (Munich 1995), § 25 V = pp. 384-386.

[364] Or "title" in the terminology of English law.

[365] Note that under German law a sales transaction is split into two separate transactions: An underlying sales contract covering only *in personam* rights and a proprietary contract covering *in rem* rights ("*Trennungsprinzip*"). Both transactions are legally independent from each other ("*Abstraktionsprinzip*").

[366] The terminology is diverse: Hans Putzo in Palandt, BGB, 62th ed. (Munich 2003), § 455 nos. 14-22 interprets "extended retention of ownership" ("*erweiterter Eigentumsvorbehalt*") as all forms of retention of ownership which are different from a simple retention of ownership. E.g. in his opinion it also covers the retention of ownership clauses which extend the charged property ("*verlängerter Eigentumsvorbehalt*"). However, in conformity with most other classifications (Harm Peter Westermann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 3rd ed. (Munich 1995), § 455 no. 90; Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. [Heidelberg 1993], § 2 I 1 footnote 4 = p. 55 qualifies the differing terminology even as "wrong") we distinguish a retention of ownership extended to other debts and a retention of ownership extended to future property.

[367] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 3 II 2 = p. 84-6.

account[368] ("*Kontokorrentvorbehalt*").[369] It secures the debts as long as the balance in the current account is not zero or the relationship is terminated.[370] It is a matter of interpretation whether the retention of ownership clause secures the total balance in the current account or whether it relates to the individual debt in the current account and covers only the debt resulting from the set-off or the recognition of the balance.[371]

Changing pools of debts can be secured by way of a global clause ("*Globalvorbehalt*", "*Geschäftsverbindungsklausel*") even if the parties have not agreed upon a current account.[372] However, the principle of certainty must be observed. Most commentators consider, however, the group retention of ownership ("*Konzernvorbehalt*") to be invalid. This type of retention of ownership secures debts of partnerships and companies forming part of the group of the debtor.[373]

The same considerations apply to a **security transfer of ownership**. Here (1) a simple security transfer of ownership, (2) a form where the secured debt is extended and (3) a form where the charged property is extended can be distinguished.[374]

---

[368] See for the civil law current account ("*bürgerlichrechtliches Kontokorrent*") Claus-Wilhelm Canaris, Handelsrecht, 22nd ed. (Munich 1995), § 25 VII = p. 390. See for the classification of the balance in a current account which is created by set-off in the current account Claus-Wilhelm Canaris, Handelsrecht, 22nd ed. (Munich 1995), § 25 III 2 = S. 378-81.

[369] Since the retention of ownership securing debts arising from a current account can be created in relation to a commercial current account (where a merchant ["*Kaufmann*"] is involved) or a civil law current account there are also two forms of "*Kontokorrentvorbehalt*": the "real" ("*echter*") and the false ("*unechter*") form (Harm Peter Westermann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 3rd ed. (Munich 1995), § 455 no. 91).

[370] Harm Peter Westermann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 3rd ed. (Munich 1995), § 455 no. 91.

[371] Claus-Wilhelm Canaris, Handelsrecht, 22nd ed. (Munich 1995), § 25 V 2 = p. 385 f.; Harm Peter Westermann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 3rd ed. (Munich 1995), § 455 no. 91.

[372] Hans-Dieter Braun, Zur nachträglichen einseitigen Begründung eines Globalvorbehalts in BB 1978, pp. 22-6; Hans-Dieter Braun, Kontokorrentvorbehalt und Globalvorbehalt (Heidelberg 1980).

[373] Harm Peter Westermann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 3rd ed. (Munich 1995), § 455 no. 93; Heinrich Honsell in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, vol. II, 13th ed. (Berlin 1995), § 455 no. 67; Hansjörg Weber, Urteilsanmerkung zu BGH, Urteil vom 30.3.1988 - VIII ZR 340/86 in JZ 1988, pp. 928-30; a different opinion is held by Rolf Serick, Bemerkungen zu formularmäßig verbundenen Verlängerungs- und Erweiterungsformen beim Eigentumsvorbehalt und der Sicherungsübertragung in BB 1971, pp. 2-10.

[374] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 3 = p. 75-104.

Security over **immovables** can secure, similar to security over movables, several debts and changing pools of debts. This applies, e.g., to the accessory land mortgage.[375] As far as the non-accessory land mortgage is concerned, payment of a monetary debt pursuant to § 1191 (1) BGB must not necessarily serve the satisfaction of a debt.[376] Furthermore, there is no dependency between the non-accessory land mortgage and a debt even in the case that this type of mortgage secures a debt. Hence, the parties are free to relate the mortgage to one debt, several debts or a pool of debts. In the case of a non-accessory land mortgage for security purposes ("*Sicherungsgrundschuld*") where the legal relationship *in rem* is accompanied by an *in personam* security agreement ("*Sicherungsvertrag*" or "*Sicherungsabrede*")[377] the security agreement can describe one debt, several debts or a changing pool of debts as the secured debt.[378]

9.2.3.1.2 Maximum amount

Under German law a maximum amount is an exception in particular the accessory land mortgage can be created with a maximum amount ("*Höchstbetragshypothek*").[379]

9.2.3.1.3 Static and dynamic security

German law allows to take security for several debts as well as for future debts. Where a security right secures a pool of debts the extent of the secured debt may fluctuate.

9.2.3.2 Additional amounts

9.2.3.2.1 Agreement between the parties

---

[375] Dieter Eickmann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6, 3rd ed. (Munich 1997), § 1113 no. 28; Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1113 no. 10.
[376] Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1113 no. 1.
[377] Dieter Eickmann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6, 3rd ed. (Munich 1997), § 1191 nos. 13-36.
[378] Dieter Eickmann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6, 3rd ed. (Munich 1997), § 1191 no. 26 distinguishes between simple security contract and the extended security contract. This is similar to the terminology seen with the retention of ownership.
[379] See § 1190 BGB.

In the case of security over movables the agreement between the parties defines to which extent additional amounts such as interest can be secured alongside the principal amount. In the case of non-accessory land mortgages the definition is done by the agreement taken together with the registration (§§ 873, 1115 BGB). Non-accessory land mortgages by way of security ("*Sicherungsgrundschuld*") clearly are "abstract" rights and are separate from and not dependent on an underlying "secured debt". However, there will typically be a debt which is intended to be secured by the non-accessory land mortgage by way of security and for this debt the definition of additional amounts is to be found in the security agreement.

9.2.3.2.2 Operation of law

An extension of the secured debt by operation of law can only be found with the pledge and the accessory land mortgage. Such an extension is not available for **retention of ownership** clauses or **security transfers of ownership** since both forms of security are dealt with by few provisions in the German civil code. Case law for these types of security does not provide for any extensions either. An extension is neither available for **non-accessory land mortgages**. §§ 1118, 1146, BGB (867 [1] third sentence ZPO) from the provisions for accessory land mortgages are not applicable analogously pursuant to § 1192 (2) BGB for the non-accessory land mortgage and the non-accessory land mortgage by way of security. The limitation pursuant to § 1190 (2) BGB is neither applicable.

§ 1210 (1) BGB provides that the **pledge** secures also interest arising from an agreement or by operation of law until the time of enforcement proceedings and preferential payment in insolvency ("*abgesonderte Befriedigung*"), respectively. Contractual penalty clauses,[380] default interest and damages are secured where they replace the performance of the obligation.[381] In addition, the pledge secures the expenses for keeping a good in a useable condition ("*Verwendungen*") (§§ 1210 [2], 1216 BGB), the costs of a contract cancellation,

[380] Which are valid under German law.

[381] See § 1210 (1) BGB; cf. for more detail Jürgen Damrau in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6, 3rd ed. (Munich 1997), § 1210 no. 2; Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1210 no. 1.

litigation and enforcement proceedings.[382] For a debt arising from a commercial current account see § 356 (1) HGB which provides that pledges remain enforceable for debts resulting from a set-off in a commercial current account.

In a similar way §§ 1146, 1190 (2) BGB, 867 (1) third sentence ZPO provide for an extension of the secured debt in the case of the **accessory land mortgage.** Interest created by operation of law (§ 1118 BGB), including default interest for the benefit of the owner (§§ 1118, 1146 BGB), litigation costs (§ 1118 BGB) and registration costs of a strict land mortgage ("*Sicherungshypothek*" here in the form of a "*Zwangshypothek*") (§ 867 [1] third sentence ZPO) are secured. This general extension of the secured debt is limited for accessory land mortgages to a maximum amount ("*Höchstbetragshypotheken*") in § 1190 (2) BGB.

In principle, additional debts covered by operation of law must not be covered by the agreement between the parties. Neither must they be registered pursuant to § 873 BGB in the case of accessory land mortgages; the extent of the liability must not be open to third parties from the registration in the land register.[383] However, in the case of the accessory land mortgage costs and interest which are not related to the secured debt proper must be covered by the agreement between the parties and be registered (§§ 873, 1115 BGB).

9.2.4 Model Law on Secured Transactions

9.2.4.1 Principal amount

9.2.4.1.1 One or more debts

Under the model law the parties have freedom to describe the extent of the secured debt. The fundamental principle of the model law is to give the parties a maximum of flexibility.

---

[382] § 1210 (2) BGB; cf. for more detail Jürgen Damrau in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6, 3rd ed. (Munich 1997), § 1210 nos. 6 f.; Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1210 no. 1.

[383] Peter Bassenge in Palandt, BGB, 62th ed. (Munich 2003), § 1118 no. 1; Dieter Eickmann in Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 6, 3rd ed. (Munich 1997), § 1118 no. 1.

Pursuant to the definition in art. 4.1 of the model law the secured debt can be (1) a single debt, (2) several debts or (3) a changing pool of debts.[384]

9.2.4.1.2 Maximum amount

Under the model law a maximum amount for the secured debt has to be stated only for the principal secured debt of a registered charge and a possessory charge (art. 4.5). Thus unsecured debts are not exposed unduly by charges covering future debts; third parties receive a meaningful indication of the relative importance of the charge. The maximum amount also avoids potential secret charges where a charge appears to be of less value than it actually is. For an **unpaid vendor's charge** the model law does not require to state a maximum amount because it only secures the unpaid purchase price (art. 9.2.1).

Under the model law the maximum amount for a **possessory charge** has to be stated in the charging instrument. This is the only possible place because the possessory charge is in principle not registered.[385] For the **registered charge** the model law requires - somewhat surprisingly - to state the maximum amount in the registration statement. The parties will almost certainly make provision for the maximum amount in the charging instrument which determines their rights in relation to the charge. For the purposes of the charge, however, only the amount stated in the registration statement is relevant. This allows the parties to change the amount during the period between entering into the charging instrument and registration of the charge. Any manipulation by the chargeholder is prevented by requiring the signature of the chargor pursuant to art. 8.4.6.1.

9.2.4.1.3 Static and dynamic security

Under the model law the parties are able to secure not only a single but also several debts (art. 4.1). They can also secure future debts (art. 4.3.4 second case). Furthermore, they can

[384] The distinction between case 2 and case 3 is not clear from the wording of art. 4.1 of the model law can, however, be taken from art. 4.3.2, 4.3.4 second case and 4.4. A changing pool of debts is possible under the model law since the parties can describe the secured debt generally (art. 4.3.2) and can thereby include future debts (art. 4.3.4 second case and 4.4).

[385] It can, however, be converted into a registered charge; see arts. 10.2, 8.2.

describe the secured debt generally (art. 4.3.2 second case). Lastly, a charge for future debts obtains the same priority as a charge for present debts created at the same time.[386]

9.2.4.2 Additional amounts

9.2.4.2.1 Agreement between the parties

Amounts additional to the principal amount will often be dealt with contractually by the parties to the security agreement. The model law clearly provides for this case in art. 4.6: "unless otherwise agreed between the chargor and the chargeholder". An extension of the secured debt to additional amounts is clearly facilitated by the model law allowing general description and identification of the secured debt.[387]

9.2.4.2.2 Operation of law

Under the model law pursuant to arts. 4.5 last part, 4.6 and 9.2.2 several amounts are included in the secured debt in addition to the maximum amount pursuant to arts. 4.5 first part and 9.2.1. The secured debt is extended to these debts by operation of law without any need to provide for them in the charging instrument or in the registration statement and to register them. However, parties can exclude such additional amounts by agreement (art. 4.6). Such additional amounts are interest which is payable contractually on the secured debt and which is either fixed or variable (art. 4.6.1), interest arising by operation of law (art. 4.6.2), costs for preservation and maintenance of charged property[388] as well as costs for an enforcement of the charge (art. 4.6.3) and, lastly, monetary damages for any breach of contract (art. 4.6.4).[389]

---

[386] See art. 4.4 which confirms this principle indirectly.

[387] Art. 4.3.2 first case.

[388] Art. 4.6.3 refers to costs incurred by the chargeholder, whereas art. 15.4.1 does refer to costs incurred by the chargor. It is, therefore, normally the duty of the chargor to undertake preservation and maintenance of the charged property under the model law. Only where the chargeholder incurs costs for such activities (as is the normal case in relation to a possessory charge, see art. 15.4.1, or for protection of charged property after an enforcement notice has been delivered, see art. 23.4.1) his costs are included as additional amounts under the secured debt.

[389] Under art. 4.6.4 the charge secures damages "for any breach of contract under which the secured debt arises". Damages are based on loss to a plaintiff, i.e. any amount by which the plaintiff's wealth is diminished in consequence of the breach of contract (see for English law G.H. Treitel, An Outline of the Law

The extension of the secured debt by operation law allows to keep the contents of the security instrument to the necessary minimum and prevents additional registration in the security register.

9.3 Legal principles

9.3.1 Analytical principles

9.3.1.1 Principal amount

9.3.1.1.1 One or more debts

Like with the contents of the secured debt the two poles between which the regulation of the extent of the secured debt's principal amount sits can be marked. The principle of freedom or flexibility allows the parties freedom with the description of the extent of the secured debt's principal amount. The limitation principle, on the other hand, limits the parties freedom to describe the extent of a secured debt's principal amount.

All legal systems examined in this study clearly follow the principle of freedom or flexibility as far as the extent of the secured debt's principal amount is concerned. The simple retention of ownership under German law (and equally the retention of title under English law as well as the unpaid vendor's charge under the model law) is an exception to this rule at the surface only. This security right secures only the sales price obligation which is a present debt. However, parties are not limited to secure future debts since they are free to choose e.g. under German law a retention of ownership extended to other debts. Hence,

---

of Contract, 4th ed. [London 1989], Chapter 18 2 a ii = p. 317). In the case of a breach of a loan agreement by way of non-payment of principal and interest the loss will usually only be the amount not paid by the debtor. Any further losses, e.g. foregone interest on possible deals with other debtors, may not be recoverable because they are too remote. For example, under English law there must be a 'serious possibility' or a 'real danger' that a loss will occur for it to be forseeable and therefore recoverable (The Heron II [1969] 1 AC 350; G.H. Treitel, *op. cit.*, Chapter 18 2 d i = pp. 335-6). In other words, art. 4.6.4 would have significance in England only in those rare cases where the circumstances are such that a special loss is foreseeable at the time of formation of contract as a consequence of non-payment. This would never arise where the creditor is a commercial enterprise in the business of lending money or granting credit.

whereas the simple retention of ownership by definition is limited to certain types of debts, the legal system ensures flexibility with respect to the extent of the secured debt's principal amount.

Legal systems which feature few security interests (like English, US-American law and the model law) have the advantage that the freedom to secure various types of debts (such as present and future debts or changing pools of debts) simply has to be stated for those few security interests. Legal systems with a multiplicity of security interests such as the German law) have to restate the sample principles over and over again. The legal result, however, remains the same.

9.3.1.1.2 Maximum amount

Legal systems differ with respect to the question whether or not to require a maximum amount for the secured debt.[390]

9.3.1.1.3 Static and dynamic security

A security right can be static or dynamic in relation to the secured debt. Where the parties decide to secure a changing pool of present and future debts with a constantly changing composition and a fluctuating amount the security right will be highly dynamic in nature. An example for this type is security taken for all monies becoming due and payable under a supply agreement. The dynamic nature of the security will be most obvious from the fluctuating amount of the outstanding debt. Such fluctuations will not only occur with supply agreements but also with current accounts which are combined with an overdraft facility. They are also related to revolving credits, i.e. credits which are renewed automatically when an outstanding amount has been repaid.

There are four building blocks which are required for providing a security right which is successfully dynamic in relation to the secured debt and, therefore, covers a changing pool of debts. (1) The parties must be able to secure not only a single but also several debts; (2)

they must be able to secure future debts (American and English law speak of "future advances"); (3) they must be able to describe the secured debt generally; (4) lastly, security for future debts must obtain the same priority as security for present debts created at the same time.

9.3.1.2 Additional amounts

9.3.1.2.1 Agreement between the parties

Amounts additional to the principal amount will often be dealt with contractually by the parties to the security agreement by broadening the extent of the secured debt. Such an agreement will often replace any law providing additional amounts unless it does not comply with mandatory law. Often the parties will either exclude any additional amounts provided for by operation of law, or they will alter additional amounts legally provided for or, lastly, will provide for additional amounts which are not dealt with in the law. Where the parties provide for additional amounts by way of agreement they will have to comply with the rules which apply to the principal amount, they will in particular have to describe and to identify them and to state a maximum amount to the extent that this is required by the applicable law.

An extension of the secured debt by the parties by way of agreement can be qualified on the scale between the legal models freedom principle and limitation principle. The legal systems examined in this study follow the freedom principle. English law allows to extend the principal amount to related obligations, equally German law and the model law permit to extend the principal amount by way of agreement.[391]

9.3.1.2.2 Operation of law

In many cases additional debts are included in the scope of a security interest by operation of law (with an option for the parties to exclude any additional debts by agreement). In this

[390] Philip R. Wood, Comparative Law of Security and Guarantees (London 1995), no. 19-250.

respect legal systems can either follow the minimum principle or the maximum principle depending on how far they draw the circle of secured debts.

Since all legal systems examined in the study feature the freedom principle with respect to the extension of a secured debt's principal amount to additional amounts, the choice of either the minimum or the maximum principle (or any variation of them) represents rather a difference in legislative style than in legal policy. The result of opting for the freedom principle is namely that even where a legal system does not provide for any additional amounts by operation of law, the parties are always free to make their own choice. This is the approach taken by English and American law where we found that no additional amounts are provided for by law.[392] German law and the model law, on the other hand, provide for various types of additional amounts by law.[393]

9.3.2 Normative evaluation

9.3.2.1 Principal amount

9.3.2.1.1 One or more debts

The examined legal systems' choice of the freedom principle must be welcomed. The freedom to secure not only one single debt but also several debts or a changing pool of debt is fundamental to a modern security law. This may be illustrated by an example.

> The textbook example for a secured debt is the **single** obligation to repay a loan over a certain amount, say £1,000, to a creditor. The principal amount of the secured debt in this example is formed by a single debt. In practice it is, however, important to be able also to secure **several** debts. For example where the parties create a security right for all debts arising under a supply contract the principal amount of the secured debt comprises more than one debt. It should also be possible to take security

[391] The peculiarities of the non-accessory land mortgage by way of security under German law should be noted; see chapter 9.2.3.2.1.

[392] Hence, these legal systems follow the minimum principle.

[393] However, under German law both for the retention of ownership and the security transfer of ownership no legal extensions are provided for. With respect to retentions of ownership and security transfers of ownership German law, therefore, follows the minimum principle. As always when the secured debt is concerned the

for only **part** of a debt. For example where the outstanding payment obligation is for £1,000 the parties should be able to create security only for £500.

Clearly a risk reduction and a prevention of risk shifting can also be achieved if the securityholder establishes new security interests for any newly created debt. However, a requirement to establish a security right for a single debt only would clearly make any security right impracticable. The transaction costs would in many cases increase to an extent that the economic benefit becomes secondary to a potential securityholder. The consequence would usually be that economic activity is largely reduced on the macroeconomic level.

9.3.2.1.2 Maximum amount

Where, however, security for future debts is allowed the requirement of a maximum amount is a means of giving notice to other creditors about the secured amount and is able to encourage security with a lower priority. The requirement of a maximum amount is, therefore, a way to take into account the interests of subsequent lenders and potential securityholders as well as third parties. They are only willing to extend debts to the debtor if they know for how much debt security has been given.

9.3.2.1.3 Static and dynamic security

9.3.2.2 Additional amounts

It was already highlighted that the choice between providing for additional amounts by operation of law or allowing parties to agree on additional amounts is more a question of legislative style than of legal policy. Codified systems will often provide for some guidance by the law whereas common law systems will often count more on the ingenuity of the parties. Codified systems will justify their approach by arguing that the extension of the secured debt by operation law allows to keep the contents of the security instrument to the necessary minimum and avoids an additional registration in the security register. Both

---

German law security right of the non-accessory land mortgage by way of security has to be excluded from the

options are neutral from a normative point of view. Similarly neutral in a normative way is a legislative decision to combine party freedom and additional amounts by operation of law (the approach taken by both German law and the model law).

10 The relationship between secured debt and security interest

10.1 Legal issue

A security interest is created for the purpose of "securing a debt". This raises the question how security interest and debt are related to each other.

10.2 Legal solutions

10.2.1 English law

The relationship between the secured debt and a security interest under English law is extremely close. In this respect it should be remembered that for a security interest to attach, i.e. to be **created** as between the parties, it is not sufficient to have a debt. What is needed is actual indebtedness.[394] As far as the **extent** of the security interest is concerned the security cannot be greater in *quantum* than the amount of the indebtedness ("*Umfangsakzessorietät*").[395] Furthermore, if a secured **debt** is **transferred** to another person without mention of the security, the transferor holds the security as trustee for the transferee, who thus becomes entitled to it in equity. Hence, the security is not transferred fully to the transferee but he receives an entitlement in equity.[396] In the converse situation where **security** is transferred without reference to the secured debt, the debt is transferred by necessary implication of the law.[397] **Defences** against the secured debt equally affect the security interest. Where the secured debt is not valid it is no sufficient debt to enforce the

---

comparision.
[394] See chapter 8.2.3.7.
[395] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iii) = p. 687.
[396] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 6 = pp. 697 f.; for other ways of transferring security *op. cit.*, 23 5 = pp. 693-7.
[397] *Ibid.*

security interest (indebtedness notwithstanding). If the secured debt is not enforceable the security interest can equally not be enforced. As far as **termination** of the security interest is concerned it clearly terminates where the secured debt comes to an end. However, equity recognises an interesting intermediate status of the security interest where indebtedness has been paid back and the security interest converts into an "inchoate security interest".[398]

10.2.2 American law

Under American law the security interest is closely related to the secured debt it secures. It is only **created** (i.e. attaches) if the secured debt already exists or is a future advance.[399] Any change in the **extent** of the secured debt affects the extent of the security interest. The Code does not deal with the consequences of the **transfer** of the secured debt upon the security interest. It rather regulates directly the assignment of the security interest itself.[400] A transfer of the secured debt does not affect a transfer of the security interest; this can only be affected by a direct assignment of the security interest itself. The security interest has "no existence independent of the obligation whose payment or performance it secures".[401] **Defences** are referred to in § 9-403 UCC which deals with agreements not to assert defences.[402] Defences arising from the secured debt affect the security interest. The security interest **terminates** upon the secured obligation being discharged. Although under American law there is no provision similar to § 1204 (1) BGB[403] this follows indirectly from § 9-203 (b) (1) UCC.[404] It follows also indirectly from § 9-610 (c) UCC, pursuant to which the secured party can purchase collateral in satisfaction of the obligation. Case law also confirms that the security interest terminates if and when the secured debt

---

[398] See chapter 8.2.3.7.

[399] See chapter 8.2.2.4, 8.2.2.7 above; see in particular § 9-203 (b) (1) UCC according to which value has to be given.

[400] § 9-514 (b) UCC; see in detail Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 2.09 [16]; this conforms with the Code's approach of dealing with the secured debt only sporadically.

[401] See re Disanto & Moore Assocciates, Inc., 41 B.R. 935 = 40 UCC Rep. Serv. 1483.

[402] So-called "cutoff" or "waiver of defense" clause; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 4.03 [3] [b] [xx].

[403] See chapter 12.2.3.1 below.

[404] Thilo Rott, Vereinheitlichung des Rechts der Mobiliarsicherheiten. Möglichkeiten und Grenzen im Kollisions-, Europa-, Sach- und Vollstreckungsrecht unter Berücksichtigung des US-amerikanischen Systems der Kreditsicherheiten (Tübingen 2000), p. 74.

terminates.[405] Not relevant is the situation with respect to termination statements any longer. § 9-404 (1) UCC old version provided that it is not the filing of a termination statement which terminates the security interest but the discharge of the secured obligation. Any failure to file a termination statement created only rights for the debtor to claim (1) damage for any loss caused to the debtor by such failure and (2) statutory damage of US$ 100.[406] However, under § 9-513 (d) UCC new version the filing of a termination statement now terminates the effectiveness of a financing statement.

10.2.3 German law

Under German law two obligations have to be distinguished to understand the relationship between secured debt and security right properly:

(1) the obligation to create a security right; and
(2) the secured debt.

10.2.3.1 Relationship between security right and secured debt

As far as the relationship between secured debt and security right is concerned German law distinguishes between so-called 'accessory' and 'non-accessory' security rights. The accessory nature of security right is to achieve both legislative simplification[407] as well as a way of achieving protection of the debtor.[408]

According to Dieter Medicus five aspects of accessoriety can be distinguished. The 'leading' right (which in the case of security rights is the secured debt) can be necessary for the **creation** of the security right. E.g. pledge and accessory land mortgages are not created

[405] For references see Thilo Rott, Vereinheitlichung des Rechts der Mobiliarsicherheiten. Möglichkeiten und Grenzen im Kollisions-, Europa-, Sach- und Vollstreckungsrecht unter Berücksichtigung des US-amerikanischen Systems der Kreditsicherheiten (Tübingen 2000), pp. 74-6.
[406] § 9-404 first sentence UCC old version; for statutory damages see Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 2.15 [2].
[407] Dieter Medicus, Die Akzessorietät im Privatrecht in Juristische Schulung 1971, pp. 497-504 (498-501).
[408] Christoph Paulus, Grundfragen des Kreditsicherungsrecht in Juristische Schulung 1995, pp. 185-92 (187).

without an existing secured debt.[409] Secondly, the **extent** of the following right can be oriented at the leading right. E.g. an accessory land mortgage secures the secured debt only to the extent that this secured debt really exists. For any amounts shown in the land register which are in excess of the real (i.e. agreed between the parties) extent a non-accessory land mortgage for the benefit of the owner (*"Eigentümergrundschuld"*) exists. The accessoriety with respect to the extent of the security right is, however, not to be found with the pledge in movables things, receivables or other rights. Thirdly, the leading right can decide about the legal consequences on the following right in case of an assignment by way of agreement or a **transfer** by operation of law. For example, pledges and accessory land mortgages follow the secured debt in case of an assignment of the secured debt (§§ 401, 1153 [1] BGB). Matters become, however, complicated when the accessory land mortgage is acquired in good faith. Since the protection of good faith is linked to the registration of the mortgage in the land register, § 1138 BGB assumes the existence of the secured debt for the purpose of acquiring the mortgage even where there is no such debt. However, pursuant to § 1184 (1) BGB § 1138 BGB is excluded where the land mortgage is a strict land mortgage (*"Sicherungshypothek"*).[410] A fourth aspect of accessoriety is the direct effect of **defences** against the leading right also on the following right. Examples for this form of accessoriety are to be found in § 1211 and § 1157 BGB. The **termination** of the leading right can lead to the simultaneous termination of the following right.[411] A sixth aspect - not mentioned by Dieter Medicus - can also be seen as a facet of accessoriety: the issue whether **security** can be taken **over an accessory security right** (i.e. a pledge or an accessory land mortgage) which is not regulated under German law explicitly. The security right created over an accessory security right can only be a pledge in other rights or a security transfer of other rights. Both a pledge in other rights and a security transfer of other rights do not occur in practice with respect to already existing pledges or accessory land

[409] For the question of accessoriety of retention of ownership and security assignment: Karsten Schmidt, Zur Akzessorietätsdiskussion bei Sicherungsübereignung und Sicherungsabtretung in Ulrich Huber and Erik Jayme (eds.), Festschrift für Rolf Serick zum 70. Geburtstag (Heidelberg 1992), pp. 329-50; for the question of accessoriety of the non-accessory land mortgages: Rolf Stürner, Das Grundpfandrecht zwischen Akzessorietät und Abstraktheit und die europäische Zukunft in Ulrich Huber and Erik Jayme (eds.), *op. cit.*, pp. 377-88 (380-6).

[410] Several types of accessory land mortgages must, by operation of law, take the form of a strict land mortgage; see §§ 1187, 1287 second sentence BGB, 866 (1) ZPO.

[411] § 1204 (1) BGB. The negative consequences of an accessory security right (such as an accessory land mortgage, a ship mortgage or an aircraft mortgage) are sometimes avoided by taking as secured debt an

mortgages since these would follow the same rules as a transfer according to the provisions of pledge law or accessory land mortgage law, respectively.[412]

As the examples have shown, it is not necessary that accessory rights have all aspects of accessoriety. For example the pledge in movable things, receivables or other rights is not accessory to the debt secured as far as its extent is concerned. The various aspects of accessoriety of a security right follow directly from the law. However, aspects of accessoriety may also be agreed between the parties.[413] And even where security rights are not accessory the security right is linked to the secured debt. Therefore, legal doctrine has only recently introduced the overarching principle of dependency on the debt ("*Forderungsgebundenheit*").[414] The concept of dependency on the debt comprises both accessory and non-accessory security rights.

Even where the security right is an "accessory" one the right to receive payment under the secured debt must be clearly distinguished from the right to enforce under the security interest. This follows from the different legal nature of both rights, one being an obligation the other one being a proprietary right, as well as from the possibility of debtor and chargor being different persons. In insolvency proceedings the two concurring claims are subject to the principle that only the balance which has been left unpaid under an enforcement of the security right remains to be paid under the secured debt.[415]

10.2.3.2 Relationship between security right and obligation to create a security right

It is peculiar to German law that a security right is not only related to a secured debt but also to an obligation to create a security right. Such an obligation to create a right *in rem* is no specialty of German law *per se* but exists under any other legal system which clearly distinguishes between rights *in rem* and rights *in personam*. However, the need for an

---

abstract or bare debt acknowledgement ("*abstraktes Schuldanerkenntnis*"); see Baur and Stürner, Lehrbuch des Sachenrechts, 17th ed. (Munich 1999), § 36 III 1 = p. 402.

[412] See § 413 BGB for security transfers and § 1274 (1) first sentence BGB for pledges in other rights.

[413] For substitutes of accessoriety see footnote 423 below.

[414] Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993).

[415] „*Prinzip der Ausfallhaftung*"; see for the old German insolvency law §§ 64, 212 III, 234 KO and Fritz Baur, Konkurs- und Vergleichsrecht, 2nd ed. (Heidelberg 1983), § 10 III; for the new German insolvency law see § 52 InsO.

obligation to create a security right is a special feature of German law. The obligation to create a security right is the legal reason (in Latin called "*causa*", also referred to as causal obligation) upon which a potential securityholder can base his right to create a security right. The parties may often not be aware about this legal need and German law will, hence, often have to assume that an obligation to create a security right is inherent to another agreement.[416]

The obligation to create a security right can be found in either a separate security agreement ("*Sicherungsabrede*" or "*Sicherungsvertrag*") or, in the case of a retention of ownership, in a sales contract pursuant to § 433 BGB.[417] In principle, the security right's validity and enforceability is not dependent on the validity and enforceability of the obligation to create a security right. German doctrine says that the security right is an "**abstract right**"[418] and speaks in this context about the abstraction principle.[419] The abstraction principle is one of the fundamental principles of German property law and - from the point of view of comparative law - only shared by Swiss law.[420] Any defects in the obligation to create a security rights can only - with respect to the security right - be remedied by restitution law ("*Bereicherungsrecht*", §§ 812-822 BGB).

Abstraction is not absolute under German law but can be breached ("*durchbrochen*") in two situations:

---

[416] In fact, the need for an obligation to create a security right is rarely mentioned explicitly in the German literature on security law.

[417] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 2 I 3 = pp. 62 f. Different from English law a sales contract under German law does not transfer ownership (or title) but creates an obligation to do so only.

[418] Which must be distinguished from an abstract transaction ("*abstraktes Rechtsgeschäft*"); Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 2 I 2 b = p. 60.

[419] Cf. the detailed explanation by Alfred Hueck and Claus-Wilhelm Canaris, Recht der Wertpapiere, 12th ed. (Munich 1986), pp. 26, 165-76.

[420] Astrid Stadler, Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion. Eine rechtsvergleichende Studie zur abstrakten und kausalen Gestaltung rechtsgeschäftlicher Zuwendungen anhand des deutschen, schweizerischen, österreichischen, französischen und US-amerikanischen Rechts (Tübingen 1996); Konrad Zweigert and Hein Kötz, An Introduction to Comparative Law (translated by Tony Weir) (Oxford 1977), § 15 = pp. 177-89; Swiss law applies the abstraction principle only to *in rem* transactions related to rights and not to transactions related to things; Konrad Zweigert and Hein Kötz, *op. cit.*, § 15 III = pp. 185-8; Konrad Zweigert and Hein Kötz, *op. cit.*, 2nd ed. (Oxford 1987), § 40 II = pp. 474 f.; Hein Kötz, Rights of Third Parties. Third Party Beneficiaries and Assignment in International Encyclopedia of Comparative Law, vol. VII: Arthur von Mehren (ed.), Contracts in General, chapter 13 (Tübingen, Dordrecht, Boston, Lancaster

(1) where the underlying obligation and the right *in rem* share the same "fault" (so-called "*Fehleridentität*") in particular (a) where they are linked by way of a condition[421] or (b) where a unitary transaction ("*Geschäftseinheit*") pursuant to § 139 BGB (applied by way of analogy) exists;[422] and

(2) where a proprietary transaction is "causal" ("*kausale Verfügung*"), i.e. linked to its underlying obligation.[423]

10.2.4 Model Law on Secured Transactions

10.2.4.1 Relationship between charge and secured debt

The dependence between secured debt and the charge manifests itself in various aspects, the most important being the need for a (at least future) secured debt at the time of **creation** of the security. In the model law this dependence at the time of creation has found expression in a number of provisions. There are references in arts. 1.1 ("for a debt"), 3.1, 4.1, 6.5.3 ("secure a debt"), 7.3.2, 8.4.2, 8.4.3, 14.1 and 14.2. Although a debt is necessary for the creation of a charge under the model law there is an important modification. Charges can also be created where the debt is future, i.e. does not yet exist or exists but is not held by the person giving the charge at the moment of creation (art. 4.3.4 second case). The details of this situation have been discussed above.[424]

A further consequence of the dependence between secured debt and security can be that changes in the **extent** of the secured debt affect the extent of the security. Under the model law, however, an increase or a reduction in the amount of the secured debt does not necessarily affect the extent of the charge itself. The general concept underlying the model

---

1992); it has been proposed to abolish the abstraction principle in German law for the assignment of receivables (Konrad Zweigert and Hein Kötz, *op. cit.*, 2nd ed. (Oxford 1987), § 40 II = pp. 475 f.)

[421] Note, however, § 925 (2) BGB according to which ownership in land cannot be transferred under a condition.

[422] This latter case was controversial in German doctrine but is now *communis opinio*; see Philipp Heck, Grundriß des Sachenrechts (Tübingen 1930), § 30 8 = pp. 121-2.

[423] Conditions, the creation of a unitary transaction (§ 139 BGB by way of analogy) as well as a fundamental change of circumstances underlying the contract ("*Wegfall der Geschäftsgrundlage*") can serve as a substitute for accessoriety ("*Akzessorietätsersatz*"); see Alfred Hueck and Claus-Wilhelm Canaris, Recht der Wertpapiere, 12th ed. (Munich 1986), p. 39. Furthermore, the introduction of a security limit for non-accessory security rights (see chapter 12.2.3.1.3) also serves as a substitute for accessoriety.

law is again to give the parties flexibility in arranging their affairs. Pursuant to art. 14.2 rights arising out of the charge can only be claimed "if the charge extends to that debt". If there is a reduction in the secured debt the charge can, at first view not extend to that debt. Art. 32.1.2 provides that a charge terminates "to the extent that" the secured debt is satisfied or otherwise ceases to exist. Again the reduction of a debt seems to affect directly the charge itself. It must, however, be remembered that the parties have great freedom in describing and identifying the secured debt. Any changes in the actual outstanding amount of the secured debt will not have a direct effect on the charge as long as the debt is not affected according to the parties' description and identification. This raises the question whether or not the securityholder will be able to enforce a charge for amounts not outstanding under the model law. The answer must be 'no' because one must clearly distinguish between existence and enforcement of the charge.

The charge can be transferred simultaneously with the **transfer** of the secured debt, i.e. a change or the debt's creditor (either by way of contract, art. 18.1 or by operation of law, 18.7; where the secured debt is transferred by way of contract the parties can exclude the transfer of the security, art. 18.1 first sentence[425] whereupon the security will terminate, art. 32.1.9).

Where there is dependence between secured debt and security it is possible to hold **defences** against the secured debt also against the security. The model law contains a clarification to this effect in art. 14.4 and art. 18.4.

If and to the extent that the secured debt, as described and identified by the parties, **terminates** the security will normally terminate, too. The model law contains a respective provision in art. 32.1.3. As the charge cannot live without a secured debt it must cease to exist also in the cases where the charge is transferred without the secured debt (art. 32.1.9).

---

[424] See chapter 8.2.4.4.

[425] Different from the situation under § 401 BGB where the transfer cannot be excluded; see Helmut Heinrichs in Palandt, BGB, 62th ed. (Munich 2003), § 399 no. 7, § 401 no. 1.

[425a] This is particularly relevant with respect to structured financings such as project financings (see chapter 8.2.1.2 above).

A rare constellation of dependence between secured debt and security is provided for in the model law in art. 12.6. It has just been mentioned that the model law provides that a charge cannot be transferred by way of contract without the debt it secures (art. 18.1). A **charge** cannot, therefore, be **charged** unless the secured debt is also charged and the assumption is made that any transfer or charge of the secured debt extends to the charge (art. 12.6 second sentence). It is, however, open to the chargor and the chargeholder of either the charge over the secured debt or the charge given to secure that debt to agree otherwise in the charging instrument. This is one of the exceptions to the principle that a contract with the owner of property not to charge it is not valid against a subsequent chargeholder (see art. 5.4.2).

The dependence between charge and secured debt is also evident at the time of **enforcement**. It is the failure to pay the secured debt which generally enables the chargeholder to enforce the charge (see art. 22.1). It must, however, be noted that many agreements will specify events other than the non-payment of the secured debt which may make the agreement immediately repayable. Default must consequently not always be a default with a monetary obligation.[425a] The secured debt itself must, however, be a monetary one at least at the time of enforcement (art. 4.2. second sentence).[426]

Although under the model law the security interest is dependent on the secured debt the chargeholder can make two separate claims under the respective right. This should in practice not result in double payment of the securityholder which any national law implementing the model law may achieve e.g. by adopting respective provisions in its insolvency law.[427]

If one were to classify the charge as an accessory or a non-accessory right in the sense of these terms under German law one would encounter difficulties. Given the great freedom granted to the parties in describing and identifying the secured debt the charge does not seem to fit the simple dualism of accessoriety and non-accessoriety. The parties are able to agree various types of dependency between these two poles and from a terminological point

[426] See chapter 8.2.4.2 above.
[427] See the example of German law chapter 10.2.3.1 above.

of view it is preferable to classify the charge as a right which is dependent on the secured debt. In any event the charge is accessory only to a limited extent or accessory only in a formal sense.[428]

10.2.4.2 Relationship between security right and obligation to create a charge

The question of the dependence between secured debt and security has to be distinguished from the questions (1) whether or not an obligation to create the security must accompany the security right (**causal obligation**) and (2) whether or not any lack of or defect in this obligation will affect the property right (abstraction principle). For example, under Dutch law an obligation to create a security right must exist in order to create the security itself (causal system). Albeit under German law an underlying obligation must also accompany the property right any lack of or defect in the obligation will not affect the property right but will only lead to claims of unjust enrichment. Under the model law no decision has been taken whether or not a causal obligation is necessary or whether or not abstraction applies. These are decisions which are left to national legal systems implementing the model law.

10.3 Legal principles

10.3.1 Analytical principles

10.3.1.1 Relationship between security interest and secured debt

In our study of the relationship between security interest and secured debt we found three analytical principles:

- the principle of close dependence (English law, American law, accessory rights under German law),
- the principle of independence (non-accessory rights under German law), and
- the principle of choice between dependence and independence (model law).

[428] The distinction between formal accessoriety and substantive dependency on the secured debt may be helpful in this context.

Whereas under the principle of dependence the security interest reacts to changes in the secured debt during the various phases of the legal relationship,[429] the security interest is relatively independent under the principle of independence. Where the security interest is **dependent** on the secured debt it is rather a "framework right"[430] the exact contents of which is only defined by its interplay with the secured debt. The purpose of the dependence is twofold: first, it serves as a legislative simplification[431] because the effects of any changes in the secured debt are clearly defined by reference to dependence and do not have to be taken care of by the parties. Second, it is one way of achieving protection of the debtor.[432] The dependence between secured debt and security interest can take various forms as has been shown in our analysis of the legal systems.

The most important aspect of dependence between security interest and secured debt is the need for a (at least future) secured debt at the time of **creation** of the security interest. However, as far as the existence of a secured debt as a requirement for the creation of the security interest is concerned, two different approaches have to be distinguished:

- many legal systems deem the mere existence of a secured debt to be sufficient (German law, model law);
- several legal systems go further and require an actual indebtedness, advance or giving of value (English law, American law).[433]

---

[429] See for the phases Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), pp. 427 f.

[430] "*Rahmenberechtigung*"; this is the expression used by Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), pp. 6, 13, 37 et al.; the concept of a "framework right" was famously introduced by Wolfgang Fikentscher (see Schuldrecht, 8th ed. [Berlin, New York 1991] nos. 1216-31) for explaining the nature of the "right to an enterprise" ("*Recht am eingerichteten und ausgeübten Gewerbebetrieb*"), a special tort based on § 823 (1) BGB. However, in the context of the "right to an enterprise" "framework right" means that a balancing of interests ("*Güterabwägung*") is necessary to confirm the right in an individual case. Becker-Eberhard uses the word to highlight the referential relationship between one right (the security right) and another (the secured debt).

[431] See Dieter Medicus, Die Akzessorietät im Privatrecht in Juristische Schulung 1971, pp. 497-504 (498) for German accessory rights.

[432] Christoph Paulus, Grundfragen des Kreditsicherungsrecht in Juristische Schulung 1995, p. 187.

[433] Karin Milger (Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 52) seems not to distinguish clearly enough the two different approaches since she likens the requirement of an advance under § 9-203 (b) (1) UCC for security interests under American law to the principle of accessoriety for pledges under German law. In fact, the requirement of an advance goes further than the mere requirement of the existence of a debt.

A further consequence of the dependence between secured debt and security can be an effect of changes in the **extent** of the secured debt on the extent of the security (in particular English law and accessory land mortgages under German law) or an effect of the **transfer** of a leading right on a dependant right. Where there is dependence between secured debt and security it may be possible to hold **defences** against the secured debt also against the security. If and to the extent that the secured debt, as described and identified by the parties, **terminates** the security will normally terminate, too. English law featured the interesting option of an inchoate security interest which enables the parties to "warehouse" the security interest during such periods in which there is no actual secured debt.[434] Dependence may also be evident from the rules on **security interests over security interests** or the rules on **enforcement**.

Interesting to note is the existence of security interests which are based on the principle of **independence** like the non-accessory land mortgages under German and Swiss law.[435] These independent rights are clearly an exception to the rule that in most legal systems security rights are closely dependent on the debt they secure. It is, therefore, not surprising that even in the case of independent rights the parties will want to create a link between both mortgage and secured debt at least by way of a (security) agreement.

With the model law we encountered a legal system which featured a charge which was dependent on the secured debt but left the parties the **freedom to choose** the degree of dependency.

10.3.1.2 Relationship between security interest and obligation to create a security interest

German law featured not only a secured debt but also an obligation to create a security right. The security right was, however, not directly dependent on this obligation since it was designed as a so-called "abstract right".

10.3.2 Normative evaluation

[434] Much like the non-accessory land mortgage for the benefit of the owner under German law; see chapter 10.2.3.1.

10.3.2.1 Relationship between security interest and secured debt

The **dependence** between secured debt and security suggests a certain inflexibility in the way the parties can arrange their affairs. This is indeed the case under a number of legal systems. For example, if under a German accessory land mortgage ("*Hypothek*") the secured debt terminates the mortgage itself will convert into a non-accessory land mortgage for the benefit of the owner ("*Eigentümergrundschuld*").[436] An accessory right is closely tied to the secured debt and there is no freedom for the parties to depart from the legal provisions.

Where security rights are built upon the principle of **independence** (such as the non-accessory land mortgage under German law) the parties will often tend to define the relationship between security right and secured debt by way of (security) agreement.[437] The principle of independence seems to have its greatest value in avoiding some of the greatest stringencies of dependent rights (such as termination of the security right). However, these stringencies should be rather avoided than be dealt with by way of independent rights.

Under the model law and a number of modern legal systems dependence does, however, not put major obstacles into the parties' way since they are largely **free** to define the relationship between security interest and secured debt. Under the model law the parties have great freedom to describe and to identify the secured debt.[438] In addition, the charge can secure future debts (art. 4.3.2 case 2) without the creation of the charge being delayed until the creation of the secured debt. As far as the extent and the termination of the charge are concerned they are essentially dependent on the definition by the parties (arts. 32.1.2, 32.1.9). It is well possible that at a certain time there is no debt between debtor and chargeholder but that according to the definition of the secured debt in the security instrument the charge is to survive this period. Hence the parties are able to vary the degree of dependence between secured debt and security.

---

[435] „*Grundschuld*" and „*Schuldbrief*", respectively.
[436] §§ 1163 (1), 1177 (1) BGB.
[437] They feature dependency of the security right in a wider sense.
[438] In particular, the secured debt can be described specifically or generally (arts. 4.3.2, 7.3.2).

10.3.2.2 Relationship between security interest and obligation to create a security interest

The requirement of a causal obligation under German law is a technical necessity for this legal system which is built upon it. However, it is clearly not a building block of a modern security law.

Part IV
Charged Property

Proprietary security is security in certain assets.[439] The rules relating to charged property[440] form, therefore, the second fundamental building block of security. Similar to the situation of the secured debt security law must determine (1) the type of property which can be taken as security, (2) the extent to which property is taken as security and (3) the relationship between charged property and security.

11 The type of charged property

11.1 Legal issue

The first legal question with respect to the charged property is which type of property can be charged by a security interest.

11.2 Legal solutions

11.2.1 English law

[439] See the principle of property right chapter 7.2 above.
[440] Article 9 UCC uses the term "collateral" (see definition in § 9-102 [a] [12] UCC). Under English law "collateral" also means the assets subject to the security interest. In untechnical language the term "collateral" is often used for the security interest itself. The model law refers to "charged property" instead of "collateral".

11.2.1.1 Property

11.2.1.1.1 Things and rights

Similar to other laws English law distinguishes between real property (or realty) and personal property (or personalty, chattels).[441] Somewhat surprisingly **real property** is all interests in land (e.g. freehold interests) other than leasehold interests, whereas leasehold interests are qualified as chattels real.[442] **Personal property** falls into leasehold interests (chattels real), tangible movables (choses in possession, i.e. goods and money) and intangibles (choses in action). The two latter categories form both chattels personal. Choses in action can again be distinguished in documentary intangibles and pure intangibles. Within the category of pure intangibles an interesting distinction emerges, namely that between receivables and book debts. A book debt is a debt due to a trader in the course of his trade, and which in the ordinary course of business would be entered in his books.[443] Security e.g. in project financings is taken often on both book debts and receivables in order to avoid that certain payment obligations fall outside the scope of the chargeholders security.[444]

Pure intangibles raise another issue of English law. Problems sometimes arise when a bank takes security over the credit balance in a customer's **account**, a special form of a book debt. Under English law it was held by Millett J in the famous decision of Re Charge Card Services Ltd.[445] that a charge over a credit balance by a bank is conceptually impossible,[446]

---

[441] See in general Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 3 = pp. 32 f.; F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), II = pp. 19-39 as well as the non-comprehensive list of types of property in sec. 396 (1) Companies Act 1985.

[442] F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), II = p. 19; for all practical purposes leasehold interests are, however, interests in land; Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 3 = p. 32.

[443] Shipley v. Marshall (1863) 4 CB (NS) 566; Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 3 n. 98 = p. 659; sec. 396 (1) (e) Companies Act 1985 deals with book debts by a company; for book debts by a sole trader or partnership see Roy Goode, Commercial Law, 2nd ed. (London 1995), 24 2 (iii) n. 41 = p. 705.

[444] For the difficult issues concerning charges over book debts see the Privy Council's Brumark decision (Richard Dale Agnew and Another v The Commissioner of Inland Revenue and Another [Privy Council Appeal No 35 of 2000, 5 June 2001]); Shashi Rajani, Fixed charge over company's book debts after Brumark in 17 Insolvency Law & Practice 2001, pp. 125-8.

[445] [1986] 3 All E.R. 289. Confirmed by the Court of Appeal in Morris v Agrochemicals Ltd; Re BCCI (No 8) [1996] Ch. 245 = [1996] 2 BCLC 254.

[446] Roy Goode, Commercial Law (London 1982), 25 4 (iii) 3 = p. 721 had put this view forward previously.

for the debtor cannot become his own creditor and sue himself. It has also been argued in favour of this position that a debt is not property as between the creditor and the debtor, only as between the creditor and a third party.[447] This position is, however, controversial in English law. The decision in Re Charge Card Services Ltd. has now been reversed by the House of Lords.[447a] Lord Hoffmann, delivering the decision of the House of Lords, established that it is perfectly possible for a bank to take an equitable charge over money deposited with it.

English law also recognises entities where power is given to a manager to change them. They are called **funds**. Although such funds will in most cases be collective entities, such as the capital of a company or groups of investments managed by a trustee, it has been held that a fund can also be established in a single asset.[448] The concept of a fund best describes the charged property of a floating charge or floating mortgage.[449] A closed end fund is one which can only reduce whereas this is not the case with an open-ended fund.[450]

As we have already seen[451] English law allows a floating charge or mortgage. This floating charge can cover the **assets of a company**.[452] The institution of the floating charge may thus lead to a practical combination of a class of assets as the charged property for one comprehensive security interest.

11.2.1.1.2 Title

[447] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 3 = p. 660.
[447a] Morris v Rayners Enterprises Incorporated / Morris v Agrichemicals Ltd; Re BCCI (No 8) [1998] AC 214 = [1997] 4 All ER 568.
[448] Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 13 (iii) n. 181 = p. 66; a different opinion seems to be held by F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), II = pp. 20, 38 f.
[449] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 4 = p. 646, 25 2 = p. 733.
[450] Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 2 n. 10 = p. 733.
[451] See chapter 6.3 above.
[452] This excludes by implication assets which are not mentioned in sec. 396 (1) Companies Act 1985.

English law such as common law systems generally does not refer to "ownership"[453] but to the two elements of title and interest.[454] English (and American) law distinguishes further between legal and equitable title and interest.[455]

11.2.1.1.3 Prohibitions on granting security

Under English law a negative pledge[456] is valid between the parties which have agreed upon it which follows from the English doctrine of privity of contract[457]. Such negative pledge clauses are, i.a., of fundamental importance in project financings.[458]

11.2.1.2 Present and future property

At **common law** transfers of after-acquired property (i.e. under a mortgage) or assignments of debts or other contract rights have no proprietary effect unless there is a new act of transfer. Hence, security in such assets equally has no proprietary effect. This is confirmed in section 5 Bills of Sale Act (1878) Amendment Act 1882 for security bills of sale over after-acquired property. Parties form only an agreement to mortgage or assign the property as and when acquired.[459] However, the courts of **equity** recognise a transfer of after-acquired property and assignments of debts and other contract rights. In the decision in Holroyd v Marshall[460] it was held that an equitable mortgage over after-acquired property attached automatically on acquisition without the need for a new act. The mortgage or charge of after-acquired property, therefore, is a present security interest which is, however, inchoate. Upon the debtor acquiring an asset within the after-acquired property clause the

---

[453] For English law see F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), pp. 114-7.
[454] Jan-Hendrik Röver, Prinzipien, § 9 II 3 b = pp. 142-3.
[455] See Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 5, 6 = pp. 35-46; Jan-Hendrik Röver, Prinzipien, § 9 II 3 b = p. 142.
[456] See for details of negative pledge clauses in the context of international financings Ravi Tennekoon, The Law and Regulation of International Finance (London 1991), pp. 89-97.
[457] See for this doctrine Roy Goode, Commercial Law, 2nd ed. (London 1995), 3 10 = pp. 106-8; G.H. Treitel, An Outline of the Law of Contract, 5th ed. (London, Dublin, Edinburgh 1995), 13 3 = pp. 233-46; Jan-Hendrik Röver, Prinzipien, § 9 II 3 e = pp. 148-9.
[458] Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Handbuch Projekte und Projektfinanzierung (Munich 2001), chapter 6.2.6.9.1 = pp. 210-1.
[459] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (ii) 3 = p. 645; 23 1 = p. 675.
[460] (1862) 10 HL Cas 191; see also Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 1 = pp. 730-1.

security interest attaches to that asset with effect from the date of the agreement unless the agreement itself evinces a contrary intention.[461]

The rule of common law that a transfer of after-acquired property has no proprietary effect at law[462] is qualified by three exceptions: the principle does not apply to (1) contracts for the sale of goods, (2) the assignment of future copyright[463] and (3) potential property.[464] Of particular interest is the last exception that present property includes **potential** (present) **property**. "Potential property" is property not yet in existence but growing out of that which is in existence and is owned by the debtor.[465] Examples for potential property are milk from cows, growing crops or rights growing out of existing contracts. The category of potential property moves the border between present and future property by qualifying some types of assets not yet in existence as present property. Where security is taken over potential property the security interest cannot be asserted until the potential property comes into existence.

Similar to the issue discussed in the context of advances[466] it is a point of discussion whether after-acquired property becoming acquired and already existing property are covered by one single security interest (single-interest theory) or whether each new attachment creates a new security interest. Since the priority of the security interest for each new attachment remains the same, the security interest must be one and not several.[467]

A security interest cannot be greater in *quantum* than the amount of the debtor's indebtedness.[468] Where an advance is made on the security of after-acquired property, value is taken to be given in relation to every asset subsequently coming in under the after-acquired property clause. The security margin provided by charged property is thus

---

[461] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 1 = p. 676; 23 2 = pp. 678-9; 23 2 (iii) = p. 682.
[462] And that attachment of a security interest requires a present interest in the charged property by the debtor; the debtor's possession qualifies as a present interest, Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (iii) footnote 37 = p. 682.
[463] Section 91 Copyright, Designs and Patents Act 1988.
[464] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 1 footnote 1 = p. 675.
[465] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (iii) = p. 682.
[466] See chapter 8.2.3.7 above.
[467] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (ii) = p. 686.
[468] See chapter 10.2.1 above.

increased almost *ad infinitum*.[469] The accumulation of charged property under an after-acquired property clause can continue endlessly. This extends even to assets acquired after the debtor's bankruptcy or after the debtor's discharge.[470]

11.2.1.3 Unconditional and conditional property

11.2.1.4 Property inside and outside the jurisdiction

English law applies in principle the *lex situs* rule to security interests in both immovable and movable things.[471]

11.2.2 American law

11.2.2.1 Property

11.2.2.1.1 Things and rights

§ 9-102 (1) UCC lists the general categories of property to which Article 9 UCC applies, namely personal property and fixtures. **Personal property** comprises goods,[472] documents,[473] general intangibles,[474] chattel paper[475] and accounts[476]. The notions of "general intangibles", "fixtures" and "chattel paper" need some clarification. "**General intangibles**"[477] are personal property other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments[478], investment property, letter-of-

[469] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iii) = p. 687.
[470] The common law rule against perpetuities, under which no interest is good unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest (F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. [Oxford 1982], p. 178; see also their explanation of the rule *ibd.*, pp. 176-86) provides only a theoretical limitation.
[471] J.G. Collier, Conflict of Laws (Cambridge, New York, New Rochelle, Melbourne, Sydney 1987), Chapter 13 = pp. 207-30; C.G.J. Morse, Retention of Title in English Private International Law in Business Law Journal 1993, p. 168.
[472] Defined in §§ 9-102 (a) (44) UCC.
[473] Defined in §§ 9-102 (a) (30), 1-201 (15), 7-201 (2) UCC.
[474] Defined in §§ 9-102 (a), (42) UCC.
[475] Defined in § 9-102 (a) (11) UCC.
[476] Defined in § 9-102 (a) (2) UCC.
[477] See § 9-102 (a) (42) UCC.
[478] See definition § 9-102 (a) (47) UCC.

credit rights, letters of credit, money and oil, gas, or other minerals before extraction. **Fixtures**[479] are goods which "have become so related to particular real estate that an interest in them arises under real estate law". Article 9, hence, does not really define the notion of fixtures but leaves it up to state law to provide an appropriate definition. The drafters of Article 9 felt that state laws differed too much with respect to the notion of fixtures and, therefore, a general definition was not possible.[480] State laws have taken three different approaches to the issue whether or not a good qualifies as a fixture.[481] Most states apply the "traditional test" which is based upon three criteria:[482]

- annexation;
- appropriation to the use of the realty with which it is connected; and
- intention to make the article a permanent improvement of the freehold.

The states of New Jersey and Pennsylvania follow the institutional doctrine and the industrial plant doctrine, respectively, which result both in much wider notions of fixtures than the traditional test. Although fixtures are in principle subject to real estate law the security interests created in them are in principle subject to Article 9. However, an encumbrance upon fixtures can also be created pursuant to real estate law.[483] **Chattel paper**[484] is an instrument evidencing both a monetary obligation and a security interest.[485] Such chattel paper is used in the US for financings which are called "floor planning arrangements".[486]

---

[479] See §§ 9-102 (a) (41) UCC; in Germany referred to as "*Grundstückszubehör*". Goods which are related to other goods in a way that their identity is preserved are called "accessions" ("*Zubehör*" under German law; § 97 BGB; "*Zubehör*" can be related to either goods or real estate). Conflicts between several security interests in accessions are dealt with under § 9-335 UCC. See for a comparision between accessions under American law and "*Zubehör*" under German law Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 73.

[480] Grant Gilmore, Security Interests in Personal Property, vol. 2 (Toronto, Boston 1965), p. 807.

[481] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), pp. 80-1 who also compares the notion of fixtures under US-American law to the notion of „*Zubehör*" under German law.

[482] Initially set out in Teaff v. Hewitt, 1 Ohio St. 511 (1853).

[483] § 9-334 (b) UCC.

[484] § 9-102 (a) (11) UCC.

[485] In this dual coverage it can be compared to a debenture under English law which can, however, only be issued by a company.

[486] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), pp. 82 f. also with a comparison to the situation in Germany.

The 1998 revisions of the UCC expanded the Code's scope in a number of important areas, in particular with respect to intangibles.[487] Until the 1998 revisions outright transfers of personal property were not secured transactions and were not subject to Article 9 UCC with the exception of an outright sale of accounts and chattel paper.[488] In particular outright sales of general intangibles representing a right to payment of money were covered by the rules on assignment of choses in action. The 1998 revisions included also outright sales of general intangibles in the scope of Article 9 UCC[489] but still excluded sales of certain general intangibles (such as loan participations). Other types of collateral which were included in the scope of Article 9 UCC by the 1998 revisions were commercial tort claims,[490] business insurance[491] and deposit accounts[492].

11.2.2.1.2 Title

American law like English law does not refer to "ownership"[493] but to the two elements of title and interest and distinguishes further between legal and equitable title and interest. However, for the purposes of security law it is not relevant whether the creditor wants to acquire title in the collateral or whether he wants to acquire a mere security interest whilst title remains with the debtor.[494] Nevertheless, the debtor must in principle hold title to the collateral if he wants to grant valid security to the creditor.[495] There are only limited ways

[487] Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992); Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), Appendix A (Revisions of UCC Article 9: The 1992 Final Report); Jan Hendrik Dalhuisen, Dalhuisen on International Commercial, Financial and Trade Law (Oxford, Portland/Oregon 2000), p. 644; Philip R. Wood, Comparative Law of Security and Guarantees (London 1995), no. 9-241; see also the new Article 8 UCC dealing with investment securities.

[488] § 9-102 (1) (b) UCC old version.

[489] See Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992), 43-8.

[490] See for the old law the exclusion in § 9-104 (k) UCC old version.

[491] But not personal insurance such as life, disability and health insurance; see Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992), 56-7.

[492] Contrary to the position of English law under the decision in Re Charge Card Services Ltd.; see chapter 11.2.1.1.1 above.

[493] For English law see F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), pp. 114-7.

[494] § 9-202 UCC; Jan-Hendrik Röver, Prinzipien, § 10 II 4 = p. 167. See also chapter 7.3 above.

[495] See § 9-203 (b) (2) UCC.

to acquire a security interest if the debtor does not hold title to the collateral but the creditor acts in good faith with respect to title in the collateral.[496]

11.2.2.1.3 Prohibitions on granting security

11.2.2.2 Present and future property

Under Article 9 UCC it is possible to create security interests over future property which is called "after-acquired property" in US-American terminology.[497] However, the parties have to agree in their security agreement on a so-called after-acquired property clause.[498] The security interest is only created once the asset is acquired;[499] for the issue of priorities, however, the time of perfection is decisive under § 9-322 (a) (1) UCC; only where there are no perfected security interests the conflict between several attached security interests is settled by reference to the time of attachment.[500] Hence, the first-to-file-or-perfect rule[501] also applies.

The accumulation of secured property under a future property clause can continue endlessly. This accumulation of property is, however, limited by insolvency law at the time of opening of insolvency proceedings. That the scope of the insolvency provisions must be carefully limited is illustrated by a famous US-American case. In its decision Benedict v. Ratner 268 US 353 the US Supreme Court (Brandeis, J.) struck down as a fraudulent conveyance an assignment of present and future debts ("accounts receivable" in the American terminology) under which the debtor was allowed to collect the debts, use the proceeds as it saw fit, not notify the debtors of the assignment and generally not account to the lender. The court held that such "unfettered dominion" by the debtor over the collateral

---

[496] § 2-403 UCC; Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 52 footnote 29.
[497] § 9-204 (a) UCC.
[498] § 9-204 (a) UCC.
[499] § 9-203 (b) UCC. American law follows the single interest theory. According to Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (ii) = p. 686 this issue "has greatly occupied American commercial lawyers". However, it is nowadays not even discussed in a comprehensive handbook like Barkley Clark's The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (see in particular 10.01 [1]). For the situation under English law see chapter 11.2.1.2
[500] § 9-322 (a) (3) UCC.
[501] See also chapters 8.2.2.4, 12.2.2.2.1.2, 12.2.2.2.2.2.

and its proceeds worked a fraud on other creditors and was voidable in bankruptcy.[502] § 9-205 UCC finally avoided the unfortunate effects of Benedict v. Ratner.

11.2.2.3 Unconditional and conditional property

11.2.2.4 Property inside and outside the jurisdiction

American law incorporated the *lex situs* rule in the 1962 Official Text of § 9-102 (1) UCC but abolished this rule in the 1972 Official Text; in principle the parties can now agree – as far as the **attachment** of a security interest is concerned - under § 1-105 (1) first sentence UCC on the applicable law provided the chosen law has a "reasonable relation" to the transaction; failing such agreement the law of the state with an "appropriate relation" will apply pursuant to § 1-105 (1) second sentence UCC.[503] For **perfection** and the effects of perfection and non-perfection the special rule of § 9-301 UCC applies.[504] § 9-103 UCC provided until the 1998 revision of the UCC a number of special conflict rules for goods, documents and instruments (§ 9-103 [1] UCC), certificates of title (§ 9-103 [2] UCC), accounts, general intangibles and mobile goods such as airplanes and rolling stock (§ 9-103 [3] and chattel paper (§ 9-103 [4] UCC). As far as goods were concerned the UCC applied either (1) the *lex situs* of the place where the last event of perfection or non-perfection occurred (§ 9-103 [1] [b] UCC) or (2) the *lex situs* of the place of which the parties understand that the good will be located (§ 9-103 [1] [c] UCC). The other important conflicts rule could be found in § 9-103 (3) (a) UCC: the law applicable to accounts, general intangibles and mobile goods is the law of the location of the debtor. The 1998 revisions of the UCC provided a single choice-of-law rule for all types of collateral - the location of the debtor.[505] The UCC provisions on international aspects discussed in this paragraph deal mainly with interstate conflicts issues, i.e. interlocal conflicts of law.

---

[502] See also Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 10.01[4]; Grant Gilmore, Security Interests in Personal Property, vol. 1 (Toronto, Boston 1965), Chapter 8.

[503] See James White and Robert S. Summers, Uniform Commercial Code, 3rd ed. (St. Paul/Minn. 1988), § 21-10.

[504] See James White and Robert S. Summers, *op. cit.*, § 22-20 to § 22-26 dealing with § 9-103 UCC old version.

[505] See new § 9-301 (1) UCC and some exceptions in §§ 9-303 to 9-306 UCC. Also Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report

11.2.3 German law

11.2.3.1 Property

11.2.3.1.1 Things and rights

German law is characterised by the principle of form[506] and hence provides different types of security rights for different types of charged property. The **accessory and the non-accessory land mortgage** as well as the **non-accessory annuity land mortgage** can be created only over real estate, albeit movable things may equally be covered if they form legally a part of real estate.[507] The **pledge** over movable things and the **retention of ownership** are security rights in movable things, whereas the pledge over receivables, negotiable instruments or other rights is a security right covering certain rights. The **security transfer of ownership** is not a unified type of security right but follows different rules depending on the type of charged property concerned. A security transfer of ownership in real estate can be effected pursuant to § 873 BGB. In practice it is almost never done since the obligation to create a security transfer of ownership in real estate must be notarised[508] pursuant to § 313 BGB and the transfer itself is subject to a tax on land purchases ("*Grunderwerbssteuer*").[509] A security transfer of ownership in movable things is effected mostly pursuant to §§ 929 first sentence, 930 BGB. A security transfer of receivables is done pursuant to §§ 398 ff. BGB and a security transfer of other rights pursuant to §§ 413, 398 ff. BGB or any applicable specific provisions. Special types of

---

(December 1, 1992) (Philadelphia 1992), 74-8; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), Appendix A (Revisions of UCC Article 9: The 1992 Final Report), p. A-8.

[506] See chapter 7.4 above.

[507] So-called liability of accessories or appertunances ("*Zubehörhaftung*"); see chapter 12.2.3.2.2 below.

[508] In the special form of "*notarielle Beurkundung*" which extends to the contents of the document (and which is to be distinguished from a "*notarielle Beglaubigung*" which confirms only the identity of the undersigned).

[509] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 1 I 2 a = p. 25. For the so-called "effective security transfer" by way of broadly worded security agreements ("*Sicherungsabreden*") see Rolf Stürner, Das Grundpfandrecht zwischen Akzessorität und Abstraktheit und die europäische Zukunft in Ulrich Huber and Erik Jayme (eds.), Festschrift für Rolf Serick zum 70. Geburtstag (Heidelberg 1992), pp. 377-88 (381 f.).

charged property are ships,[510] aircrafts,[511] rolling stock[512] and cables.[513] Special rules apply to accounts,[514] intellectual property rights,[515] shares in partnerships and companies,[516] negotiable instruments (documenting payment rights) and payment rights not embodied in instruments ("*Wertrechte*")[517] as well as expectancy rights ("*Anwartschaftsrechte*").[518]

---

[510] §§ 8-82 Act on rights in ships ("*Schiffsrechtegesetz*") of 15 November 1940; International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels 17 May 1967 (not yet in force); Convention on the Registration of Inland Navigation Vessels, Geneva 25 January 1965, Protocol No. 1 Concerning Rights *in Rem* in Inland Navigation Vessels and Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels; International Convention on Maritime Liens and Mortgages, Geneva 6 May 1993 (not yet in force).

[511] Act on rights in aircrafts ("*Gesetz über Rechte an Luftfahrzeugen*") of 26 February 1959; Convention on the International Recognition of Rights in Aircraft, Geneva 19 June 1948; UNIDROIT Convention on International Interests in Mobile Equipment, Cape Town 16 November 2001 and UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Cape Town 16 November 2001. See for the various international conventions governing security interest in transportation law Jan-Hendrik Röver, Prinzipien, § 4 II 2 a = pp. 32-4.

[512] See for security interests in property of a railway company § 112 EGBGB; this provision allows local legislators to bring all property of a railway company into one pool of property, the so-called "railway unit" ("*Bahneinheit*") without the necessity to meet the requirements of §§ 93 ff. BGB; see also Philipp Heck, Grundriß des Sachenrechts (Tübingen 1930), § 27 3 c = p. 105; Joseph Hönle in J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, vol. Art. 1, 2, 50-218 EGBGB, 13th ed. (Berlin 1998), Art. 112 EGBGB no. 1.

[513] Act on pledges in cables ("*Kabelpfandgesetz*") of 31 March 1925.

[514] See for accounts in general Claus-Wilhelm Canaris, Bankvertragsrecht, 3rd ed. (Berlin, New York 1988), no. 142. For pledges of accounts *ibd.*, nos. 184-203.

[515] See for security interests in copyrights and rights of publishers Eugen Ulmer, Urheber- und Verlagsrecht, 3rd ed. (Berlin, Heidelberg, New York 1980), pp. 360 f., 469 f. and Gerhard Schricker in Schricker (ed.), Urheberrecht. Kommentar (Munich 1987), vor §§ 28 ff. no. 42; for proprietary transactions ("*Verfügungen*") involving payment rights arising from copyrights and rights of publishers ("*Vergütungsansprüche*") in general Gerhard Schricker in Schricker (ed.), Urheberrecht. Kommentar (Munich 1987), vor 28 §§ nos. 30-32.

[516] Walther Hadding and Uwe H. Schneider (eds.), Gesellschaftsanteile als Kreditsicherheit (Berlin 1979).

[517] For the notion of "*Wertrecht*" see Alfred Hueck and Claus-Wilhelm Canaris, Wertpapierrecht, 12th ed. (Munich 1986), § 1 III 1 = pp. 17 f.; for the phenomenon that negotiable instruments become increasingly dematerialised: Ulrich Drobnig, Vergleichende und kollisionsrechtliche Probleme der Girosammelverwahrung von Wertpapieren im Verhältnis Deutschland-Frankreich in Herbert Bernstein, Ulrich Drobnig and Hein Kötz (eds.), Festschrift für Konrad Zweigert zum 70. Geburtstag (Tübingen 1981), pp. 73-92; Ulrich Drobnig, Dokumentenloser Effektenverkehr in Karl Kreuzer (ed.) Abschied vom Wertpapier? Dokumentenlose Wertbewegungen im Effekten-, gütertransport- und Zahlungsverkehr. Arbeitssitzung der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht anläßlich der gemeinsamen Tagung der Deutschen und Österreichischen Gesellschaft für Rechtsvergleichung in Innsbruck vom 16.-19.9.1987 (Neuwied, Frankfurt a.M. 1988), pp. 11-41; Dorothee Einsele, Wertpapierrecht als Schuldrecht. Funktionsverlust von Effektenurkunden im internationalen Rechtsverkehr (Tübingen 1994); see for a comparative perspective: Randall D. Guynn, James Steven Rogers, Kazuaki Sono and Jürgen Than, Modernizing Securities Ownership, Transfer and Pledging Laws. A Discussion Paper on the Need for International Harmonization (London [International Bar Association] 1997).

[518] For expectancy rights in general: Hans Forkel, Grundfragen der Lehre vom privatrechtlichen Anwartschaftsrecht (Berlin 1962); Dieter Medicus, Bürgerliches Recht. Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung, 15th ed. (Köln, Berlin, Bonn, Munich 1991), § 20; Ludwig Raiser, Dingliche Anwartschaften (Tübingen 1961) and with a critical perspective Wolfgang Marotzke, Das Anwartschaftsrecht - ein Beispiel sinnvoller Rechtsfortbildung? Zugleich ein Beitrag zum Recht der

If under German law a person giving security grants security over a debt due to it from the securityholder (the situation of the English case Re Charge Card Services Ltd.)[519] the debt is not affected. German law even upholds the existence of a debt if the person giving security subsequent to the creation of the security right becomes debtor and creditor of the same debt.[520]

11.2.3.1.2 Ownership

The person giving security must in principle be the owner (or, in the case of rights, the holder) of the charged property. Private ownership under German law can be characterised as a comprehensive property right with a positive and a negative side.[521] Positively the owner of a thing is allowed to use it, negatively he is allowed to exclude others from affecting it.

However, in cases where the person giving security is **not** the **owner** of an asset the person receiving security may acquire the right in good faith ("*gutgläubiger Erwerb*"). Good faith acquisition is possible mainly with respect to immovable and movable property (where the latter excludes rights). Rights can only be acquired in good faith in extremely rare circumstances.[522]

Sometimes a person is not yet the full owner of a thing but is said to have already an **expectancy right**.[523] E.g. a person acquiring a good under an ownership retention clause will have an expectancy right until the condition of payment of the purchase price is fulfilled. The provisions of ownership apply to expectancy rights by way of analogy.

Verfügungen (Berlin 1971); Peter O. Mülbert, Das inexistente Anwartschaftsrecht und seine Alternativen in (2002) 202 AcP, pp. 912-50.

[519] See chapter 11.2.1.1.1 above.

[520] Karl Larenz, Lehrbuch des Schuldrechts, vol. I: Allgemeiner Teil, 13th ed. (Munich 1982), § 19 I b = p. 249; Dieter Medicus, Schuldrecht I. Allgemeiner Teil. Ein Studienbuch, 13th ed. (Munich 2002), § 37 V = p. 214.

[521] See § 903 BGB; Fritz Baur, Lehrbuch des Sachenrechts, 12th ed. (Munich 1983), § 24 I = p. 221-9; Dieter Medicus, Bürgerliches Recht. Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung, 15th ed. (Köln, Berlin, Bonn, Munich 1991), no. 607.

[522] On the basis of a certificate of indebtedness ("*Schuldschein*"), §§ 405, 398 BGB or a certificate of inheritance ("*Erbschein*"), §§ 2366, 398 BGB.

[523] See footnote 518 above.

Hence, a good to which a person has an expectancy right only can also become encumbered by a security right.

If a person cannot give in principle as security what it does not own or hold it follows that charged property must be **capable of being owned**. This leaves the so-called *res extra commercium*[524] outside the scope of security law.

In principle the person giving security and the person receiving security must be different persons. However, under certain circumstances a person can acquire a security right in its own assets ("*Recht an eigener Sache*").[525] This is recognised for pledges in rights if the pledgor has a legitimate interest in the pledge[526] and provided for by operation of law in the case of a non-accessory land mortgage for the benefit of the owner.

11.2.3.1.3 Prohibitions on granting security

German law deals with contractual ("*rechtsgeschäftlichen*") prohibitions of proprietary transactions in §§ 137, 399 BGB and § 357a HGB. In particular, the parties can agree a negative pledge clause ("*Negativklausel*").[527]

Limits to security rights are also set by §§ 138 (1), (2), 307 BGB (formerly § 9 AGBG) and § 242 BGB ("*Treu und Glauben*"). Should they apply, these provisions render a security right invalid. Particularly important are §§ 138 (1), 307 BGB (formerly § 9 AGBG). They apply in three general cases: (1) undue limitations of the debtor by contracts which limit a party's economic freedom to an extent that its free determination is lost ("*Knebelung*");[528] (2) putting third parties at a disadvantage ("*Gläubigerbenachteiligung*") which is

[524] Helmut Heinrichs in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), vor § 90 nos. 7-13; he further distinguishes between public goods (*res communes omnium*) like air and water, religious assets (*res sacrae*) and assets for public use (*res publicae*).
[525] See § 1256 (2) BGB for pledges and in general Philipp Heck, Grundriß des Sachenrechts (Tübingen 1930), § 25 4 b = pp. 97-8.
[526] Claus-Wilhelm Canaris, Die Rechtsfolgen rechtsgeschäftlicher Abtretungsverbote in Ulrich Huber and Erik Jayme (eds.), Festschrift für Rolf Serick zum 70. Geburtstag (Heidelberg 1992), pp. 9-35 (30).
[527] Jan-Hendrik Röver, Projektfinanzierung in: Ulf R. Siebel (ed.), Handbuch Projekte und Projektfinanzierung (Munich 2001), chapter 6.2.6.9.1 = pp. 210-1.
[528] Helmut Heinrichs in Palandt, BGB, 62th ed. (Munich 2003), § 138 nos. 38, 97; Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 16 II 2 b = p. 253.

particularly relevant if a security assignment conflicts necessarily with retention of ownership clauses agreed between the debtor and third parties;[529] and (3) excessive security ("*Übersicherung*")[530]. All these cases apply even where both parties are merchants.

11.2.3.2 Present and future property

Under German law security rights (accessory land mortgage, non-accessory land mortgage and retention of ownership) in principle cannot be created in future property. At the time of creation of the security right the person giving security must own the charged property. For security rights in immovables, however, a priority can be reserved for security rights by making a note in the land register ("*Vormerkung*").

A security transfer of ownership in movable assets ("*Sicherungsübereignung*") can be done for future assets. It is created by way of "anticipated agreement" ("*antizipierte Übereignung*").[531] A contract is formed at the time of the actual agreement under the condition precedent that the property becomes owned at a future date. A pledge can be created for movable things which will become existent in future property ("potential property" in the terminology of English law) by way of an anticipated agreement which is conditional upon the goods becoming existent.[532]

11.2.3.3 Unconditional and conditional property

Under German law immovable things cannot be transferred under a condition; such a transfer is invalid (§ 925 [2] BGB). However, movable things can be transferred under a condition (most often in the form of retention of ownership clauses) as can be rights. Such conditional transfers create so-called expectancy rights in the person of the transferee. The

---

[529] Helmut Heinrichs in Palandt, BGB, 62th ed. (Munich 2003), § 138 nos. 86, 97; Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 16 II 2 b = pp. 253-4.

[530] For the last case see comprehensively chapter 12.2.3.1.3 below.

[531] Dieter Medicus, Kreditsicherung durch Verfügung über künftiges Recht in JuS 1967, p. 385; Wolfgang Wiegand, Kreditsicherung und Rechtsdogmatik in Eugen Bucher and Peter Saladin (eds.), Berner Festgabe zum Schweizerischen Juristentag 1979 dargebracht von der juristischen Abteilung der Rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern (Bern, Stuttgart 1979), pp. 283-308 (285 footnote 10).

[532] See Peter Bassenge in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), § 1204 no. 5.

creation of a security transfer of conditional ownership in movable things or rights is possible under the general rule that the rules of property law apply to expectancy rights by way of analogy. In other words the expectant ownership in a movable thing can be transferred by way of security pursuant to §§ 929 first sentence, 930 BGB (applied by way of analogy). The creation of a pledge is also possible pursuant to §§ 1205, 1206 BGB (applied by way of analogy).

11.2.3.4 Property inside and outside the jurisdiction

Under German law the *lex situs* rule applies to security rights in immovable and movable things.[533] It goes with a rule of recognition which says that foreign security rights in property moved to Germany are recognised under German law provided that they can be fitted into the German security system.[534] This causes particular difficulties with respect to English floating charges.[535]

11.2.4 Model Law on Secured Transactions

11.2.4.1 Property

11.2.4.1.1 Things and rights

The model law provides in principle for one type of security for all types of property (art. 5.2). Under the model law immovables are included in the unitary security system which distinguishes its approach from Article 9 UCC. There was no cogent reason to provide a

[533] Art. 43 (1) EGBGB; Andreas Heldrich in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), Art. 43 EGBGB, no. 1.
[534] Art. 43 (2) EGBGB; Andreas Heldrich in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), Art. 43 EGBGB no. 5.
[535] See Manfred Wenckstern, Die englische Floating Charge im deutschen Internationalen Privatrecht, in 1992 RabelsZ 56, pp. 624-95 (691-2).

different regime for immovables and movables.[536] The fundamental nature of the charge and the rights it gives rise to remain the same irrespective of the type of property.[537]

The model law allows also to create a charge over the assets of an enterprise (so-called enterprise charge, art. 5.6). Although an enterprise is not an asset itself but rather a class of assets and the enterprise charge is, therefore, a particular means of describing and identifying individual assets, the existence of an enterprise charge underlines the comprehensive character of the charge under the model law.

An enterprise charge under the model law is a specific type of class charge. Here the charged property is described as the business assets of an enterprise.[538] Enterprise is an area of economic activity including the things and rights in its use.[539] Under the model law the parties have to elect this type of charge in the registration statement (art. 8.4.5)[540] and for the remedy of enterprise charge administration a further election has to be made in the enforcement notice (arts. 22.7.4, 25.3) once enforcement proceedings have commenced in accordance with art. 22.2. The model law's enterprise charge is characterised by its strong priority (it takes immediate priority at the time of its creation),[541] which is mitigated by the priority of the unpaid vendor (art. 17.3) and the chargor's legal licence to deal in charged property (art. 19.2, 19.3 and 19.4).[542]

Since certain types of property such as means of transport (e.g. ships or aircraft) are in many legal systems left to special security regimes the model law had to provide for

---

[536] F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), pp. vi, 77, 78, 146, 225-6 emphasise the legal similarities between immovable and movable things under English law; see also the English Property Act 1925 whose title is "An Act to Assimilate the Law of Real and Personal Estate".

[537] See also chapter 6.6.8.1 above.

[538] The model law distinguishes two forms, the general enterprise charge, which covers all the business assets of an enterprise (art. 5.6.1), and the limited enterprise charge which covers only part of the assets (art. 5.6.2).

[539] Similar the famous definition of an „enterprise" by Julius von Gierke, Das Handelsunternehmen in 1948 ZHR vol. 111, pp. 7-11 which can be summarised as follows: "*Unternehmen sind der durch Gewerbe (Betriebstätigkeit) geschaffene Tätigkeitsbereich mit den ihm (regelmäßig) ein- und angegliederten Sachen und Rechten einschließlich der zu ihm gehörenden Schulden sowie die zugehörige personenrechtliche Betriebsgemeinschaft.*"

[540] Where the parties fail to make an election in the registration statement but want to create an enterprise charge at a later stage they have to create a new charge (art. 6.10).

[541] There is no exception to the general priority rule in art. 17.1. An exception under art. 17.5 will only affect part of the enterprise charge.

[542] It should be noted that the licence under art. 19.4 usually only refers to part of an enterprise charge.

exceptions from its general scope. Under the model law art. 1.2.2 has such exceptions from the general scope of security law in mind without defining explicitly which type of property should be outside its scope. This is left to national legal systems adapting the model law.

The model law allows in art. 5.2 specifically to take charges over "debts due from the chargeholder to the chargor" (the situation of the English case Re Charge Card Services Ltd.).

11.2.4.1.2 Ownership

A person cannot give in principle as security what it does not own or hold (for the model law see arts. 1, 2, 5.2 first sentence, 6.5.1). It should be noted that the term "ownership" is used untechnically in the model law and does not assume a civil or common law concept of ownership.

If a person cannot give in principle as security what it does not own or hold it follows that charged property must be **capable of being owned** (see art. 5.2 first sentence). This leaves the so-called *res extra commercium*[543] outside the scope of security law. Where property attached to other property is **transferred automatically** by operation of law it will also not be capable of being taken separately as security. It will be taken as security together with the property it is attached to (see art. 5.2 second sentence). Closely related to the exception for assets which cannot be owned is the exception for assets which cannot be **transferred separately** (see art. 5.3). This covers mainly certain rights which are regarded as being personal in nature.

11.2.4.1.3 Prohibitions on granting security

Pursuant to art. 5.4 first sentence contractual prohibitions to grant a charge on the part of the person giving security cannot prevent the creation of a charge. However, this provision only clarifies that the charge is valid as a property right. It does not specify whether the prohibition of granting security is invalid. Since the charge is valid it follows *e contrario*

that the prohibition is invalid as far as any proprietary consequences are concerned.[544] The model law does not deal with the issue whether the prohibition creates at least a contractual obligation not to create a charge. This is in line with the model law's general approach in principle not to deal with contractual relationships.

It should be remembered that under English law a negative pledge is valid between the parties which have agreed upon it.[545] This approach blurs the distinction between contractual and proprietary relationships which is strongly established in continental legal systems.[546] Hence, a second reason for the model law not to provide for the consequences of a prohibition to grant a charge (except for the direct consequences on the validity of the charge).

In two situations a prohibition to grant a charge can be agreed with proprietary effect. One exception to the rule is made in art. 5.4 first sentence for receivables which cannot be expressed as monetary obligations (art. 5.4.1). This corresponds partially to the concept of § 399 BGB. However, it should be noted that the model law excludes contractual prohibitions to grant a charge for monetary obligations.[547] Whilst the model law recognises for non-monetary receivables that the contracts are too different in their nature than to exclude a prohibition to grant security this is not recognised for monetary obligations.

A second exception is to be found in art. 5.4.2. Pursuant to arts. 5.4.2, 12.6 first sentence parties can agree that a charge does not extend to a charge which has previously been created over the same secured debt.

11.2.4.2 Present and future property

Under the model law the parties can include future property in the charged property (art. 5.8) and the charge attaches automatically once the chargor becomes the owner of the thing or right taken as security (art. 5.9). Albeit the charge is not created before the chargor

---

[543] See chapter 11.2.3.1.2.
[544] Similar to the situation under § 137 first sentence BGB.
[545] See chapter 11.2.1.1.
[546] Most strongly under German law.

becomes owner or holder of the secured thing or right (art. 6.5.1) it is for priority purposes deemed to be created at the time of registration of the charge (art. 6.8).[548] The charge, therefore, takes effect retroactively from the time the requirements of creation have been completed. During the period before the future property is owned by the chargor, in principle no rights arise out of the mere agreement between the parties to create a charge. As long as the charged property does not belong to the chargor he is protected from enforcement actions of the chargeholder because he can claim that the charge does not extend to that future property (arts. 5.9, 14.3).

11.2.4.3 Unconditional and conditional property

With respect to movable things a retention of title/ownership can be agreed. Under the model law such a retention of title/ownership clause creates an unpaid vendor's charge (art. 9). It is, therefore, not possible to create ownership in movable things under a condition precedent.[549] The model law does not deal with conditional ownership in rights and immovable things. The issue is left to national law.

11.2.4.4 Property inside and outside the jurisdiction

Although the model law generally does not deal with international issues[550] it provides an innovative rule in art. 5.7. It extends the basic concept of the model law to enable flexibility in the composition of the charged property and to allow for a dynamic security right in relation to charged property.[551] Art. 5.7 makes it possible, first, to create a charge even if some assets are or all of the charged property is located outside the jurisdiction in which creation takes place. Second, it provides that the charge remains valid and does not terminate even if some assets or all of the secured assets are brought outside the jurisdiction of creation. Kreuzer has correctly pointed out that this rule is not a conflict of laws rule but

---

[547] See now also § 357a HBG under German law.
[548] The scope of the provisions on charges in future property is, hence, limited to registered charges. There can be no unpaid vendor's charge or possessory charge over future property.
[549] We leave aside conditions subsequent which have no practical significance with respect to ownership in movable things.
[550] It touches upon the issue in respect to the secured debt in art. 4.3.3; see chapter 8.2.4.5 above.
[551] See chapter 12 below.

a rule of internal law.[552] It does not replace the *lex situs* rule but merely clarifies for internal law that facts which have happened abroad fulfil the requirements of internal law.

11.3 Legal principles

11.3.1 Analytical principles

11.3.1.1 Property

11.3.1.1.1 Things and rights

In the legal systems examined in this study we found – not surprisingly - two main groups of property: things and rights. **Things** can themselves be distinguished into immovable and movable things. Many legal systems have separate laws to cover security over **immovables**. Since land and buildings represent an important economic asset and since security on them has long been the predominant type of security it is not surprising that ways have been found to charge them adequately. Until quite recently immovables in many legal systems were the only type of property which was habitually given as security without the person giving security giving up possession to the securityholder.

Certain types of property, in particular those related to **means of transport**, are in many legal systems left to special security regimes. Often an international convention has achieved a certain degree of unification for these types of property.[553]

---

[552] Karl Kreuzer, The Model Law on Secured Transactions of the EBRD from a German Point of View in Joseph Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1997), pp. 175-95.

[553] See for **ships** International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels 17 May 1967 (not yet in force); Convention on the Registration of Inland Navigation Vessels, Geneva 25 January 1965, Protocol No. 1 Concerning Rights *in Rem* in Inland Navigation Vessels and Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels; International Convention on Maritime Liens and Mortgages, Geneva 6 May 1993 (not yet in force); see for **aircraft** Convention on the International Recognition of Rights in Aircraft, Geneva 19 June 1948; UNIDROIT Convention on International Interests in Mobile Equipment, Cape Town 16 November 2001 and UNIDROIT Protocol to the Convention on International Interests in Mobile Equityment on Matters Specific to Aircraft Equipment, Cape Town 16 November 2001.

Rights play an ever increasing role as security and must, therefore, be properly addressed in a secured transactions law. The importance of rights as security is particularly visible in project financings. They are a form of lending but rely for principal repayments and interest payments mainly on the cash flow of the project.[554] The lender in project finance situations is not so much looking at the tangible assets but at the stream of revenues generated by the project. It is particularly interested in taking security over the receivables.[555] But it is not only project financings that security in receivables plays an important role in the security structure. Most forms of modern financings rely on this element, including acquisition financings, other forms of structured lending than project financing and acquisition financing and even securitisations. English law featured an interesting distinction between receivables and book debts which is, however, a technical distinction specific to this legal system and of no general relevance to security law. Of relevance to security law are, however, the conceptual difficulties which English law has with a particular type of book debt, the credit balance in a bank's customer's account. English law does not recognise security over such a credit balance. Other legal systems did not encounter similar conceptual difficulties.

English law featured the floating charge or floating mortgage as a security interest over the assets of a company; the model law showed the enterprise charge. Both security interests where comprehensive rights which combined a class of assets for practical reasons. Enterprise security rights exist in one form or another in a number of jurisdictions[556] and are, therefore, by no means a peculiarity of the EBRD model law. The most famous illustration is the floating charge over the assets of an enterprise in English[557] and Scottish

---

[554] See for a definition of project finance Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Projekte und Projektfinanzierung (Munich 2001), chapter 6.1.1 = p. 157.

[555] John Edwards, The International Practitioner's View on the Model Law in European Bank for Reconstruction and Development, Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on Saturday 16 April 1994 in St Petersburg (London 1994), pp. 11-2.

[556] Philip R. Wood, Comparative Law of Security and Guarantees (London 1995), no. 19.3 ("universal business charges").

[557] See Re Panama, New Zealand and Australian Royal Mail Co. (1870) 5 Chancery Appeal Cases 318. The English floating charge is characterised by its potentially subordinated priority; a so-called fixed charge can always supersede a floating charge. It should also be noted that suppliers will be able to claim secured goods under retention of title clauses. Both aspects moderate the chargee's position under a floating charge.

law.[558] Equally an enterprise security is possible under the new civil code of Quebec as a "floating hypothec". Russian law also knows an enterprise security right.[559] In France and Belgium the more limited concept of a "nantissement du fonds de commerce" has been introduced. Many civil law jurisdictions remain, however, sceptical towards the concept of an enterprise charge. There is often the conceptual problem that they provide different security rights for different types of assets. More importantly they refuse the apparent monopoly of the enterprise chargeholder over the debtor's assets. It has, however, been pointed out that experience in England and Australia, in particular, suggests that the fear of a credit monopoly is unfounded since in practice since lenders frequently seek to spread the burden and risk of financing.[560]

Two principles mark the extremes in which the issue of the type of charged property can be dealt with: whilst under the maximum principle ("*Freiheitsprinzip*") all types of property are covered by a security interest, under the limitation principle (or the principle of types) ("*Begrenzungsprinzip*") the type of property is specific to a certain type or some specific types of property. Whereas the model law implements the first principle, German law is an example for an implementation of the second principle.

The differences in scope of a security interest which can be described by the maximum and the limitation principle, respectively, lead – on a general level – to the distinction between the principle of unity and the principle of multiplicity in security law.[561] When compared to other legal models, the model law is most radical in its approach as it provides in principle for one type of security for all types of property (art. 5.2 first sentence). Hence, the model law covers both security in immovables and movable things. Most provisions of the model law apply to all types of charged property and it is in this sense that the model law provides for a unified security interest. Article 9 UCC has chosen a similar approach but is limited to movable property (i.e. personal property and fixtures in the terminology of Article 9 UCC).

---

[558] Secs. 462-6 Company's Act 1985; George L. Gretton, Mixed Systems: Scotland in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1998), pp. 279-92.
[559] Arts. 42-5 Pledge Act 1992 and arts. 334 (2), 340 (2) Russian civil code 1994.
[560] David E. Allan and Ulrich Drobnig, Secured Credit in Commercial Insolvencies. A Comparative Analysis in 1980 RabelsZ 44, pp. 615-48 (630).
[561] See chapter 7.5 above.

Most legal systems, however, distinguish between different types of security for different types of property. A great variety of security rights existed under German law. Even more varied is, as an aside, French law.[562]

11.3.1.1.2 Title or ownership

As security gives the right of selling property which is a power attached to ownership only the owner or holder[563] of property or somebody with the power to create security given by the owner or holder can create security. The issue of ownership, albeit itself not a subject of security law, is nevertheless fundamental to a workable secured transactions law. Moreover, private ownership is one of the constitutive elements of market economies.[564] There are, however, marked differences in the understanding of the fundamental notion of private ownership as we saw in our analysis of the different legal systems.

Private ownership under **civil law** systems like German law can be characterised as a comprehensive property right with a positive and a negative side.[565] Positively the owner of a thing is allowed to use it, negatively he is allowed to exclude others from affecting it. The negative side of ownership is supported by different remedies which the owner can use against third parties. A particular feature of German law was the concept of so-called expectancy rights to which the rules of property (including security) law were applied by way of analogy.

---

[562] Jan-Hendrik Röver, Prinzipien, § 12 II 2 = pp. 180-1.

[563] Most laws find it convenient to distinguish between the 'owner of a thing' and the 'holder of a right'. Both have a proprietary right in an asset and the text of the model law, therefore, refers to 'owner' throughout. The German translation of the model law (see Jan-Hendrik Röver, Prinzipien, Anhang = pp. 191-226), however, distinguishes between 'owner' ("*Eigentümer*") and 'holder' ("*Inhaber*").

[564] Walter Eucken, Grundsätze der Wirtschaftspolitik, 6th ed. (Tübingen 1990), pp. 270-5; also European Bank for Reconstruction and Development, Transition report 1994 (London 1994), pp. 69-74; [European Bank for Reconstruction and Development], Economic Review. Annual Economic Outlook September 1993 (London 1993), pp. 113-32 (arguments for private ownership).

[565] Art. 544 French civil code gives the following definition: "*La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois ou par les règlements.*" Accordingly French doctrine distinguishes three aspects of ownership: usus, fructus and abusus; Jean Carbonnier, Droit civil, vol. 1: Introduction, les personnes, 16th ed. (Paris 1987), [41] = p. 216.

Common law systems like English or US-American law generally do not refer to "ownership"[566] but to the two elements of title and interest. English and American law distinguish even further between legal and equitable title and interest.[567] Albeit this approach is distinctly different from the approach of civil laws[568]common law systems achieve the main economic purpose of private ownership, namely to allocate resources to economic agents. They allow to make use of property in the most efficient way.

The **model law** left the underlying notion of ownership or title open. Being geared towards civil law jurisdictions in central and eastern Europe it uses the term "owner". Undoubtedly it would, however, also be compatible with a common law understanding of title and interest (in fact, the English version of the model law refers to "title" throughout).

By way of digression we want to touch also on **socialist laws**. Although the concept of ownership existed as a notion under socialist laws it was very different from the notion of private ownership known in western countries. Soviet law distinguished collective ownership, state ownership and personal ownership.[569] Collective ownership essentially meant a perpetual right of use and enjoyment of land for the *kolkhozi*. State ownership on the other hand was a right of use of fixed and circulating assets for *sovkhozi*. The description of these two forms of ownership demonstrates that we are not properly speaking about ownership but about **rights of usage**. Ownership proper was with the state from which the only apparent exception seemed to be personal ownership over the property of an individual for his personal needs.

During the **transition** from planned to market economies and in recognition of the fundamental importance of private ownership for a market economy central and eastern European countries re-established private ownership beyond the scope of personal ownership. The countries of central and eastern Europe have particular difficulties with

---

[566] For English law see F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), pp. 114-7.
[567] See Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 5, 6 = pp. 35-46.
[568] See, however, the distinction between *titulus* and *modus* in Austrian civil law Jan-Hendrik Röver, Prinzipien, § 9 II 3 b footnote 742 = pp. 142-3.
[569] René David and John E.C. Brierley, Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law, 3rd ed. (London 1985), nos. 312-3.

recognising ownership of land and in assets of former state enterprises.[570] The privatisation process has not always been completed, public registries are not yet fully updated, restitution still causes delays in the allocation of property and in some countries there is still a reluctance to allow private ownership for certain types of assets such as land. There is, however, no doubt that the transition to a market economy will not be accomplished without the establishment of a private ownership structure covering all types of property.[571]

11.3.1.1.3 Prohibitions on granting security

The most important prohibition on granting security which we found is a party agreement on a negative "pledge"[572]. However, under the legal systems examined (in particular English and German law as well as the model law) such negative pledge clauses did not affect the validity of the security right itself but created an obligation on the respective debtor only.

11.3.1.2 Present and future property

Many assets taken as security will already be owned by the person giving the security right and will be **present** property in this sense. It is, however, also important to provide for security rights over **future** property, i.e. property which becomes owned by the person giving the security right after the creation of the security right. There are two situations in which property can be said to be future. First, existing things or rights may exist at the time of the creation of the security right but not yet be owned by the person giving the security right at the time of creation of the security right. For example the person giving the security right may intend to acquire a car in two weeks time but is currently not its owner.[573] Second, things and rights may also be future because they do not yet exist at the

[570] European Bank for Reconstruction and Development, Transition report 1994 (London 1994), pp. 69-74.
[571] In this respect it is important to remember the critical dictum by Douglass C. North, Institutions, Institutional Change and Economic Performance (Cambridge 1990), p. 110: "Because polities make and enforce economic rules, it is not surprising that property rights are seldom efficient."
[572] "Pledge" means any type of security interest in this context.
[573] Note that the right to receive goods or services in the future is present property for it is already held by the person giving the security.

time of creation of the security right.[574] For example financing is provided for a building which still has to be built. From a legal point of view both situations can be treated the same. Interestingly, the second type of property covers also "potential property" in the terminology of English law which is re-qualified as present property under English law. A particularly important form of future property are receivables. As was already pointed out in chapter 11.3.1.1.1 security in receivables plays an important role in modern structured financings, such as project financings, acquisition financings, other forms of structured lendings and securitisations.

At first sight it seems problematic to allow future property to be covered by security rights. As we have seen[575] a property right can in principle only be established in property which is owned by the person disposing over the property. There is, however, a great practical need for security rights over future property. This can be illustrated by an example:[576]

> A lender proposes to finance the business of a car manufacturer. The manufacturer intends to enter into a series of long term supply contracts to various wholesale sellers of cars. The rights to payment for the cars under the proposed contracts will be extremely valuable to the manufacturer and similarly to the lender from the perspective of security. Those future rights should be able of inclusion in the charged property.

How can one overcome the conceptual difficulty that property rights can in principle only be created in property which is owned by the person disposing over the property? Under **German law** security rights (pledge, accessory land mortgage, non-accessory land mortgage and retention of ownership) in principle cannot be created in future property. At the time of creation of the security right the person giving security must own the charged property. For security rights in immovables a priority to the security right can, however, be reserved by making a note in the land register ("*Vormerkung*"). A security transfer of ownership in movable assets ("*Sicherungsübereignung*") can be done for future assets. It is created by way of "anticipated agreement" ("*antizipierte Übereignung*"). There is a serious

---

[574] For rights it can be distinguished further whether or not the ground out of which the right will arise exists already; see Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 3 II 3 with footnote 31 = p. 87.
[575] See chapter 11.3.1.1.2 above.
[576] See also chapter 11.3.1.1.1 above.

disadvantage to this construction: the security right will only take effect from the date all requirements for the creation of the right are complied with. In particular the transfer of ownership (i.e. the security right) is only effected from the time of the property becoming owned by the person giving security. In addition, where the security right is a security transfer of ownership the future property is first acquired by the person giving security and only a "logical second" later by the person receiving security.[577] This is of practical importance when the person giving security has gone into insolvency before acquiring the future right. The person which was intended to receive the security over the future asset will not receive the security right. Common law jurisdictions are more favourable towards the creation of security in future property. Under **Article 9 UCC** it is possible to create security interests over so-called after-acquired property, i.e. assets which become owned in future. Similarly there are no objections to security over future property with immediate priority under **English law**. However, the recognition of security in future property works only in equity and not at common law. It, therefore, creates equitable rights only (which are inchoate). This has certainly influenced the solution which was found for the **model law**. There the parties can include future property in the charged property (art. 5.8), i.e. property which the person giving the charge does not own at the time of creation of the charge. The charge attaches automatically once the chargor becomes the owner of a thing or right taken as security (art. 5.9).

The accumulation of charged property under a future property clause (English and American law as well as the model law) can continue endlessly. This accumulation of property finds, however, its end at the time of opening of insolvency proceedings.[578] The accumulation may also be voidable prior to insolvency because it is qualified under insolvency law as a preference or a fraudulent conveyance.[579]

11.3.1.3 Unconditional and conditional property

---

[577] Gerhard Lempenau, Direkterwerb oder Durchgangserwerb bei Übertragung künftiger Rechte (Bad Homburg v.d.H., Berlin, Zürich 1968).

[578] The common law rule against perpetuities under English law (which is specific to this legal system) was found not to be a limitation to the accumulation in practice; see chapter 11.2.1.2 above.

[579] Jan Hendrik Dalhuisen, Security in Movable and Intangible Property. Finance Sales, Future Interests and Trusts in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. du Perron, J.B.M. Vranken (eds.), Towards a European Civil Code (Nijmegen, Dordrecht 1994), pp. 361-89 (380).

Sometimes property is not yet owned by the person giving security but will be owned by him if a **condition precedent** (e.g. payment of the purchase price) is fulfilled. Retention of title clauses for movable things are a typical example. Note that under the model law the retention of title clause creates an unpaid vendor's charge. Similarly under Article 9 UCC a retention of title will not retain title to the property but create a security interest (a so-called "purchase money security interest").[580] In other words retention of title clauses are re-qualified by Article 9 UCC and under the model law as security rights. However, under other legal systems security can be taken on conditional property. E.g. under German law the purchaser of a movable thing (but not of immovable things) under a retention of ownership clause can already create security rights in present property because the retention of ownership clause is said to create an expectancy right for the benefit of the acquirer ("*Anwartschaftsrecht*").[581] This expectancy right is qualified as a right *in rem*. German law, therefore, allows taking security in conditional property.

11.3.1.4 Property inside and outside the jurisdiction

With respect to conflict of laws issues we found two approaches in the legal systems examined in this study. The principal conflict of laws rule governing proprietary security rights is the ***lex situs* rule**. Like for other property rights the governing law is determined by the location of the property concerned. The rule applies to security rights in immovable and movable things. It has found almost universal acceptance. This conflicts rule is usually combined with a rule of recognition which says that foreign security rights are recognised under local law provided that they can be fitted into the local security system. **American law** was found to be based on a differentiated approach: as far as the attachment of the security interest is concerned the parties are free to choose the applicable law. With respect to issues of perfection and its effects the law of the location of the debtor is applied.[581a] The **model law**, albeit not containing a conflicts rule with respect to the issue of the law applicable to security interests, featured in art. 5.7 a rule of internal law which clarified

[580] See §§ 9-107, 9-202 UCC.
[581] See chapter 11.2.3.1.2 above.
[581a] The law of the location of the debtor is now also the applicable law under the United Nations Convention on the Assignment of Receivables in International Trade.

which facts met the requirements of internal law. This rule of internal law is designed to make sure that parties – as a matter of internal law – do not loose a charge merely because a thing has moved abroad.

11.3.2 Normative evaluation

11.3.2.1.1 Property

11.3.2.1.1.1 Things and rights

A secured transactions law is of maximum practical use if it deals with all types of property. The parties must be given freedom of contract with respect to charged property or, in other words, maximum flexibility to agree what property should be secured by a security interest. Such a wide scope is in the interest of both the person giving the security as well as the securityholder. It is in the interest of the person giving security since he can use the maximum extent of his property to raise financing. However, it is also in the interest of the securityholder because he may have a choice either (1) to take security in the assets of greatest value or (2) to take a maximum comprehensive security interest which is of particular importance where he is financing a special purpose vehicle.[582]

The examination of the legal systems in this study showed that both English law and the model law fit well to these requirements. In particular the model law has implemented the principle of maximum flexibility since charged property may be all types of property (art. 5.2). Article 9 UCC featured only a limited scope and it had to be kept in mind that immovable property (real estate) was left to ununified state law in the US. However, this limited scope of Article 9 UCC clearly limits its usefulness. German law covered a broad scope of assets but made life for securityholders and persons giving security difficult with its multiplicity of security rights where different types of security rights are designed to cover individual types of assets (a model followed by many civil law jurisdictions).

Of particular interest is the approach to the issue presented in the English case Re Charge Card Services Ltd., i.e. whether or not security can be taken over debts due from the securityholder to the person giving security. There are important practical reasons to allow this form of security for a bank may often hold money for a borrower. This is illustrated in the following example:

> A trader may borrow $100,000 for the purposes of funding his business. He will continue to operate a bank account into which he pays in trading receipts and pays out his expenses. Any credit balance on the account is an amount owing by the bank to the trader. It can be charged to the bank to secure the $100,000 loan.

11.3.2.1.1.2 Title or ownership

As far as ownership is concerned we found a common law and a civil law concept of ownership (with common law making a distinction between title and interest). However, these underlying concepts are neutral from a normative point of view as far as security law is concerned. In fact, most of the modern literature on the economy theory of property rights[583] is written by American authors and, therefore, based on the common law understanding of ownership, and then adapted by authors with a civil law background without even highlighting the conceptual difference.[584]

German law features a type of pre-ownership in the form of so-called expectancy rights. This right served mainly the function of creating security interests in future property. It seems, however, to be an unnecessary complication from the point of view of security law.

11.3.2.1.1.3 Prohibitions on granting security

---

[582] See for forms of special purpose vehicle financing: Bernd Fahrholz, Neue Formen der Unternehmensfinanzierung. Unternehmensübernahmen, Big ticket-Leasing, Asset Backed- und Projektfinanzierungen (Munich 1998).

[583] For an introduction see Rudolf Richter, Institutionen ökonomisch analysiert. Zur jüngeren Entwicklung auf einem Gebiet der Wirtschaftstheorie (Tübingen 1994).

[584] The same is true for the economic discussion of security interests where the difference of underlying security interests is rarely mentioned (see already chapter 5.3).

Prohibitions on grating security with proprietary effect clearly have to be avoided since they would limit the principle of flexibility provided with respect to the assets which can be taken as security.[585] The legal systems examined in this study have all refrained from imposing significant prohibitions on granting security. They have also limited the effects of a negative pledge clause to contractual effects. It should be noted that the effect of a prohibition can be reached by reducing the class of assets which can be taken as security. We saw such an approach with the so-called *res extra commercium* under German law.[586] A similar case may be to exclude assets owned by public entities – occasionally in the specific form of public ownership (which is different from private ownership) - from the scope of security law. These approaches were not taken by the legal systems examined here but may be encountered with other legal systems.

11.3.2.2 Present and future property

There is a great practical need for security rights over future property, i.e. property not yet owned by the person giving security. As was already touched upon during the discussion of the analytical principles,[587] many modern types of financing such as project financing rely on security in rights and this clearly includes future rights which form the basis for the ongoing cash flow e.g. of a special purpose company. But even traditional financings rely on a combination of present and future property. The most welcoming approach towards security in future property could be found with the model law (art. 5.8 of the model law) and Article 9 UCC (after-acquired property). Both English and German law were unnecessarily complex with respect to taking security over future property.

It was pointed out in chapter 11.3.1.2 that an accumulation of charged property under a future property clause may be voidable under provisions of insolvency law. The scope of insolvency provisions must, however, be carefully limited, a requirement which is best illustrated by the famous US-American case Benedict v. Ratner.

11.3.2.3 Unconditional and conditional property

[585] See chapter 11.3.2.1.1.1 above.
[586] See chapter 11.2.3.1.2.
[587] See chapter 11.3.1.1.1.

Conditional property as a type of charged property was – different from conditional debts – no major feature of the security laws examined in this study. German law allowed to take security in a so-called expectancy right but more to enable security in future property than to enable the creation in conditional property *per se*. It seems to be more an issue of legislative approach than of substance whether security is created directly in future property or – indirectly – in an expectancy rights. However, expectancy rights may also be seen as a legal complication and it is, therefore, preferable to allow straight encumbrance of future property.

11.3.2.4 Property inside and outside the jurisdiction

A crucial issue is the question to which extent security rights can be created if the asset or the debtor (the latter in the case of rights) moves outside the country where the asset or the debtor was located at the time of creation of the security interest. It has long been debated whether or not international property law should allow a freedom of choice of law.[588] In any event such a choice of law even if it were recognised in one or several jurisdictions would not help much since most jurisdictions follow the *lex situs* rule exclusively. The governance of the *lex situs* rule means that any movement of an asset endangers the security interest in the encumbered asset. Because of the great diversity and incompatibility of national security rights this leads to intricate questions and in the worst case to a loss of the security right where property crosses borders.[589] This is clearly an issue which economically hinders significantly the risk-reducing function of security law. American law has attempted to help at least as far as attachment of security interests is concerned and allows for this quasi-contractual act a choice of law. The model law attempts to weaken the detrimental effects of the *lex situs* rule by introducing an innovative rule of internal law (art. 5.7 of the model law). This rule is limited in scope to movable things but a similar rule

[588] For references see Andreas Heldrich in Palandt, BGB, 57th ed. (Munich 1998), Anhang II zu Art. 38 EGBGB no. 2; the debate was settled for German conflict of laws by a codification of the *lex situs* rule in 1999 (see Art. 43 [1] EGBGB); the choice of the *lex situs* rule was based on the argument that a choice of law would not be transparent to third parties; see Andreas Heldrich in Palandt, BGB, 62th ed. (Munich 2003), vor Art. 43 EGBGB no. 1.

[589] See Karl F. Kreuzer, Europäisches Mobiliarsicherungsrecht oder: Von den Grenzen des Internationalen Privatrechts in Conflits et harmonisation. Mélanges en l'honneur d'Alfred E. von Overbeck (Freiburg i.Ue. 1990), pp. 613-41.

should be formulated for rights also. Nevertheless even without this extension it is a helpful tool. However, the cross-border movement of assets or debtors (in the latter case it is rather a change of domicile than a mere change of location which matters) remains a critical issue for security law.

This has provoked a number of proposals to provide international security rights.[590] Albeit for means of transport a number of unified rules exist, an UNCITRAL Convention on Assignment in Receivables Financing[591] and a UNIDROIT convention on security interests in mobile equipment have now been adopted, there is until now no generally satisfactory solution to the problem of moving charged property. The only remedy of the parties is to create security rights under all the laws in which the charged property might take location.

12 The extent of charged property

12.1 Legal issue

With respect to the extent of charged property we have to distinguish two components: the principal charged property and any additional charged property. The **principal charged property** can be one asset or several assets. It can be limited by a maximum value of the charged property which may be determined by the parties of the security agreement or may be a limit set by law. The security can be static or dynamic in nature. The **additional charged property** can be created either by agreement between the parties (often with respect to proceeds of sale and products) or by operation of law. Albeit both principal and additional charged property taken together will form the charged property it is helpful to distinguish between the two categories as we shall see.

12.2 Legal solutions

12.2.1 English law

[590] See Jan-Hendrik Röver, Prinzipien, § 4 II, III = pp. 27-58.
[591] Spiros Bazinas, An International Legal Regime for Receivables Financing: UNCITRAL's Contribution in 8 Duke Journal of Comparative & International Law 1998, pp. 315-58.

12.2.1.1 Principal charged property

12.2.1.1.1 One or more assets

Any security interest under English law can relate to a single asset. However, English law allows also taking security in all the debtor's present and after-acquired property. English law in principle does not require specificity of assets for the purpose of security except where the Bills of Sale Acts apply.[592] Where the security interest secures in addition existing and future indebtedness it is called "cross-over security" which is the most flexible form of security agreement.[593] An English floating charge covers a class of revolving assets which the company is to be free to manage and deal within the ordinary course of business until a crystallisation event occurs.[594] Hence, English law is very liberal when it comes to the scope of charged property.

Important is to note the scope of charged property with respect to after-acquired property. Where an advance is made on the security of after-acquired property, value is taken to be given in relation to every asset subsequently coming in under the after-acquired property clause. The security margin provided by charged property is thus increased almost *ad infinitum*.[595] The accumulation of charged property under an after-acquired property clause can continue endlessly. This extends even to assets acquired after the debtor's bankruptcy or after the debtor's discharge.[596]

12.2.1.1.2 Maximum value of charged property

---

[592] Sec. 4 Bills of Sale Act (1878) Amendment Act 1882; Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 (i) 2 = p. 681.
[593] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iv) = pp. 688 f.
[594] Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 2 = p. 732.
[595] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 3 (iii) = p. 687.
[596] The common law rule against perpetuities, under which no interest is good unless it vests, if at all, not later than twenty-one years after some life in being at the creation of the interest (F.H. Lawson and Bernard Rudden, The Law of Property, 2nd ed. (Oxford 1982), p. 178; see also their explanation of the rule *ibid.*, pp. 176-86) provides only a theoretical limitation.

Under English law the parties are under no obligation to state the value of charged property in their security agreements. There is neither a legal requirement that the amount of the secured debt and the value of the charged property have to be in a certain proportion.

12.2.1.1.3 Static and dynamic security

The **fixed charge** (or fixed mortgage) of English law is the best example for a security interest which is static in nature. The term "fixed charge" implies that such a charge cannot be taken over circulating assets and even though this was a correct description of the law until 1978, the situation has changed with the case Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd.[597] Since then the determining factor for a fixed charge has been that the creditor manages the funds in the hand of the chargor prior to crystallisation.[598] The term "fixed charge", therefore, refers in English law not primarily to the asset concerned but to the nature of the charge. The **floating charge** (or floating mortgage) is defined by the debtor's management power over its funds. In addition, the English floating charge requires an event of **crystallisation** for the transformation of the floating right into a fixed charge, i.e. a right in an identified asset. Despite the need for an event of crystallisation the floating charge creates an immediate security interest from the point of view of English law.[599]

12.2.1.2 Additional charged property

12.2.1.2.1 Agreement between the parties

Under English law the parties may agree to extend charged property. Security interests have, however, not to be extended to proceeds and products since they are covered automatically by operation of law.[600]

As far as a reservation of title clause is concerned it can be extended in a way that the reservation of title picks up the proceeds of authorised sub-sales by the buyer and requires

[597] [1979] 2 Lloyd's Rep. 142; Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 2 = p. 735.
[598] See in more detail Roy Goode, Legal Problems of Credit and Security, 2nd ed. (London 1988), pp. 52-5.
[599] Roy Goode, Commercial Law, 2nd ed. (London 1995), 25 2 = p. 734.
[600] See chapter 12.2.1.2.2 below.

these to be made over to the seller.[601] In another extension of the reservation of title it can cover products made from the goods and other materials belonging to the buyer or a third party.[602]

12.2.1.2.2 Operation of law: proceeds of sale and products

In principle, security in an identifiable asset carries through automatically to its **proceeds and products** except where the agreement indicates a contrary intention.[603] This follows from the equitable principle of tracing. The security interest in proceeds, unless separately created, is not a distinct security interest but is part of a single and continuous security interest in proceeds. Tracing will only be successful where (1) granting the remedy would not be inequitable (since the remedy is based on the rules of equity generally and trust law specifically) and (2) proceeds are not paid into a mixed fund.

However, there are two points to note. (1) A floating charge covering assets of a particular description will not carry through to proceeds of a different description.[604] (2) The strength and quality of a security interest in an asset is not necessarily the same as in its proceeds.[605]

12.2.2 American law

12.2.2.1 Principal charged property

12.2.2.1.1 One or more assets

As was clear from § 9-402 (1) UCC first sentence UCC old version ("a financing statement [...] indicating the types, or describing the items, of collateral") a security interest under American law cannot only cover one asset but also several assets. Similarly clear are now § 9-108 UCC as well as § 9-504 UCC.

---

[601] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 1 (d) = p. 654.
[602] See in more detail Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iii) 1 (d) = p. 654.
[603] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (i) = p. 642; 22 4 (iv) = p. 667.
[604] Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iv) = p. 667 footnote 123.

12.2.2.1.2 Maximum value of charged property

Under the Code there is no requirement to provide a maximum value for the collateral.

12.2.2.1.3 Static and dynamic security

The so-called "floating lien" is a means of taking security (and hence arrange financing) in accounts[606] and inventory under Article 9 UCC. The floating lien is not regulated in a specific provision of the UCC but is the result of a number of provisions. It comprises five building blocks according to Barkley Clark:[607] (1) security interests can cover after-acquired property (§ 9-204 UCC); (2) security interests extend to proceeds (§ 9-315 UCC); (3) security interests may also cover future advances (§ 9-204 (c) UCC); (4) the debtor may keep unfettered dominion over the collateral (§ 9-205 UCC – which did away with the consequences of decision in Benedict v. Ratner[608]); and lastly (5) a simple notice filing system without the necessity to file the security agreement itself, attach schedules or re-document the transaction from time to time; the financing statement does not even have to mention expressly future advances or after-acquired accounts or inventory[609].

12.2.2.2 Additional charged property

12.2.2.2.1 Agreement between the parties: proceeds and products

Under American law it is not necessary to agree on an extension of the security interest to proceeds because they are included in the charged property by operation of law.[610] It is neither necessary to agree to an extension of the collateral to products since this is – like the extension to proceeds – already provided for by operation of law.[611]

---

[605] For more details Roy Goode, Commercial Law, 2nd ed. (London 1995), 22 4 (iv) = p. 667.
[606] As defined in § 9-102 (a) (2) UCC.
[607] The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 10.01.
[608] See chapter 11.2.2.2 above.
[609] Official Comment 2 to § 9-402 UCC old version; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 10.01 [5].
[610] See chapter 12.2.2.2.2.1 below.
[611] See chapter 12.2.2.2.2.2 below.

12.2.2.2.2 Operation of law

12.2.2.2.2.1 Proceeds

Proceeds are defined in § 9-102 (a) (64) UCC in particular as "whatever is acquired upon the sale, lease, license, exchange, or other disposition of collateral".[612] Pursuant to § 9-315 (a) (1) UCC security interests in principle extend to proceeds by operation of law without the need of the parties agreeing about it in the security agreement.[613] In some cases the security interest in the proceeds must, however, be newly registered within 21 days of the sale in order for the security interest to remain perfected and not to revert to the stage of attachment.[614]

Special rules apply to **purchase money security interests**. A purchase money security interest is in particular a security interest in goods to the extent that the goods are purchase-money collateral with respect to that security interest.[615] If the original collateral of a purchase money security interest is **inventory**[616] proceeds are only covered by the security interest if they are cash proceeds which have been received at the time of delivery of the inventory to the buyer at the latest.[617] In other cases the first-to-file-or-perfect rule[618] applies. Where the original collateral of a purchase money security interest is **equipment**[619] the security interest extends to the proceeds.[620]

For the purpose of the priority rule of § 9-322 (a) (1) UCC[621] proceeds from the sale (or other disposition) of assets taken as security or proceeds subject to a security interest are

---

[612] See Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 10.01[2].
[613] This is sometimes referred to as "real subrogation".
[614] See § 9-315 (d) UCC.
[615] § 9-103 (b) (1) UCC.
[616] For a definition see § 9-102 (a) (48) UCC.
[617] § 9-324 (a) UCC.
[618] § 9-322 (a) (1) UCC; see already chapter 11.2.2.2.
[619] For a definition see §§ 9-102 (a) (33) UCC.
[620] § 9-324 (e) UCC.
[621] First-to-file-or-perfect rule.

included in the security interest.[622] Hence, the priority of a security interest in proceeds follows from the time of filing of the security interest in the original collateral.

12.2.2.2.2.2 Products

The solution under US-American law is as follows. In principle a perfected security interest extends by operation of law to products if goods are commingled and the original goods' "identity is lost in a product or mass".[623] The issue whether or not a good looses its identity is mostly determined by reference to the criteria (1) if and (2) and at which costs the individual parts of a product can be separated again.[624] Furthermore, the parties can agree that the security interest extends into the new product and they have to document this agreement in the financing statement.[625] Under this alternative there is no need for a loss of identity of the goods.[626] There may not be only one supplier of leather but several. The collision between several security interests in the same goods is dealt with under § 9-315 (f) (2) UCC (the so-called "sharing rule"): they rank equally but according to the ratio of their contribution.[627] However, the scope of § 9-336 (f) (2) UCC is somewhat limited. It deals only with the situation of conflicting security interests which were already created in the original goods. The more frequent case will be the conflict between a secured party holding a security interest which extends to products and a creditor with a security interest in all the products of a debtor. In such a case, it seems, the first-to-file-or-perfect of § 9-322 (a) (1) UCC has to be applied.[628]

---

[622] § 9-322 (b) (1) UCC; for insurance proceeds (§ 9-204 [c] UCC) see chapter 12.2.2.2.2.3 below; special rules apply to proceeds of sale of assets taken as security under purchase money security interests. American law distinguishes here between the proceeds of sale of inventory (§ 9-324 [a] UCC) and the proceeds of sale of equipment (§ 9-324 [e] UCC; Grant Gilmore, Security Interests in Personal Property vol. II (Toronto, Boston 1965), pp. 791-7).

[623] § 9-336 (a) UCC.

[624] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 71.

[625] This now follows from the general filing provision § 9-504 (1) UCC and was formerly mentioned explicitly in § 9-315 (1) (b) UCC old version.

[626] An example is given by Grant Gilmore, Security Interests in Personal Property vol. II (Toronto, Boston 1965), p. 848: the parts from which a machine is assembled do not loose their identity under American law.

[627] § 9-336 (f) (2) UCC refers to "the proportion to value of the collateral", the extent of each security interest is determined *pro rata* to the value of the original contribution.

[628] Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 72.

12.2.2.2.2.3 Fixtures and insurance proceeds

US-American law allows the parties to take a security interest in **fixtures** to land; in this respect it deals with fixtures in the law of movable security.[629] However, as already noted earlier,[630] an encumbrance upon fixtures can also be created pursuant to real estate law. **Insurance proceeds** are included in the collateral by operation of law.[631]

12.2.3 German law

12.2.3.1 Principal charged property

12.2.3.1.1 One or more assets

12.2.3.1.1.1 One asset

German law is characterised by the principle of specificity, i.e. a property right such as a security right can in principle relate only to one single, legally separate asset and cannot cover, for example, a library as a whole.[632] Hence, in principle there are as many security rights as there are secured assets (or in our example: books)![633]

12.2.3.1.2.2 Several assets

---

[629] See § 9-334 UCC.
[630] Chapter 11.2.2.1.1.
[631] § 9-204 (c) UCC.
[632] The doctrines of specificity and certainty are not always clearly separated; see Fritz Baur, Lehrbuch des Sachenrechts, 12th ed. (Munich 1983), § 4 III = p. 32 and Dieter Medicus, Bürgerliches Recht. Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung, 15th ed. (Köln, Berlin, Bonn, Munich 1991), nos. 26, 521 who both define certainty as specificity and *vice versa*; Wolfgang Wiegand, Kreditsicherung und Rechtsdogmatik in Eugen Bucher and Peter Saladin (eds.), Berner Festgabe zum Schweizerischen Juristentag 1979 (Bern, Stuttgart 1979), pp. 283-308 (291 footnote 34) even denies that both doctrines can be distinguished. A clear distinction is, however, drawn by Christoph Paulus, Grundfragen des Kreditsicherungsrecht in Juristische Schulung 1995, p. 188 and Manfred Wolf, Sachenrecht (Munich 1976), nos. 21-3.
[633] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 6 II 3 = pp. 100 *et seq.*, § 7 IV = p. 116 (for possessory pledges in movable things), § 8 II 2 = pp. 120 *et seq.* (for fiduciary transfers of title to movable things), § 15 I = p. 240 (for pledges in rights).

However, under the security transfer (and only under this security right) several assets[634] can be taken as security by way of general description. For example fiduciary assignments of claims and fiduciary transfers of ownership may cover classes of assets (e.g. the contents of a warehouse whose compositions may change ["*Warenlager mit wechselndem Bestand*" or "*Raumsicherungsübereignung*"][635]). There are also a number of explicit provisions which permit even a single security right over several assets of the same type.[636] However, under German law an enterprise cannot be charged as such.[637]

12.2.3.1.3 Maximum value of charged property

For none of the security rights of German law there is a requirement to state the value of the charged property. However, the charged property's value becomes important because of the limitations on overcharging or excessive security ("*Übersicherung*").[638] They apply not to accessory security rights (which are strictly linked to the secured debt) but only to non-accessory security rights.[639] They have been developed in the context of security assignments and retention of ownership clauses[640] but it seems possible to apply them also to security transfers of ownership[641] and to non-accessory land mortgages[642].

---

[634] „*Rechts- oder Sachgesamtheiten*"; see Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 8 II 2 = p. 121; this has to be differentiated from a "*Sachinbegriff*" or "*Sachgesamtheit*" (sometimes called "*universitates facti*" [Philipp Heck, Grundriß des Sachenrechts (Tübingen 1930), § 26 6 = p. 102]), i.e. several assets which are connected by way of a common purpose only; Hansjörg Weber, *op. cit.*, § 6 II 3 = p. 100. A "*Sachgesamtheit*" cannot, in principle, be pledged as such. Security can only be taken in the individual assets.

[635] See Peter Bassenge in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), § 930 nos. 2-4.

[636] See §§ 1132 ("*Gesamthypothek*"), 1222 ("*Pfandrecht an mehreren Sachen*"), 1273 (2), 1222 BGB for contractual security rights, § 559 BGB for a statutory security right and § 1120 for the extension of an accessory land mortgage to appertunances.

[637] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 6 II 3 = p. 101.

[638] See generally Christoph Becker, Maßvolle Kreditsicherung (Köln, Berlin, Bonn, München 1999), chapter 12 = pp. 233-304.

[639] See for this generalisation Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 16 II 2 b = p. 255.

[640] It applies not only to retention of ownership clauses extended to other debts (Hansjörg Weber, *op. cit.*, § 10 II = p. 166) but also to simple retention of ownership clauses (Hansjörg Weber, *op. cit.*, § 9 I = p. 144).

[641] Hansjörg Weber, *op. cit.*, § 16 II 2 b = p. 255; § 8 II 2 = p. 121.

[642] Not yet decided in German case law.

Overcharging is the non-proportional relationship between the value of the security right (such as a security assignment) and the secured debt.[643] The securityholder may overcharge only until a value of the charged property is reached which is indispensable (!) for securing the securityholder including his potential risks from an enforcement of his security right.[644] The value limit for overcharging set by case law is 20% for retention of ownership clauses extended to other debts[645] and 50% for security assignments[646]. In any event 50% may also apply to the security transfer of ownership to single assets.[647] If these value limits are breached the security interest will be invalid pursuant to § 138 (1) BGB (*"Sittenwidrigkeit"*) or § 307 (1) first sentence BGB (formerly § 9 [1] AGBG, a provision applicable to general terms and conditions) if the overcharging existed *ab initio*.[648] Overcharging which results after creation of the security right leads in principle only to a release claim.[649]

Until recently the securityholder could avoid the invalidity of his security interest if he agreed a security release clause (*"Freigabeklausel"*) which had to comply with the following requirements:

(1) it had to provide a security limit in specific numbers; and

(2) it had to contain the obligation on the securityholder to release security which was in excess of the security limit.[650]

Hansjörg Weber[651] correctly pointed out that the introduction of a security limit for non-accessory security rights introduced a new substitute for accessoriety (*"Akzessoritetätsersatz"*)[652], i.e. lead to a dependency of security rights from the secured right. However, under new case law[653] any overcharging which results after creation of the

[643] Hansjörg Weber, *op. cit.*, § 16 II 2 b = p. 254.
[644] Hansjörg Weber, *op. cit.*, § 10 II = p. 166 for retention of title clauses extended to other debts.
[645] Helmut Heinrichs in Palandt, BGB, 62th ed. (Munich 2003), § 138 no. 97.
[646] *Ibid.*
[647] *Ibid.* and Peter Bassenge in Palandt, BGB, § 930 nos. 23-5.
[648] Helmut Heinrichs in Palandt, BGB, 62th ed. (Munich 2003), § 138 no. 97.
[649] *Ibid.* and BGHZ 133, 25.
[650] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 16 II 2 b = p. 254.
[651] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 16 II 2 b = p. 255.
[652] See footnote 423 above.
[653] See the groundbreaking decision in BGHZ 133, 25 (II 2d).

security right leads to a claim of the person giving security against the securityholder under which the former can claim that assets are released.

12.2.3.1.4 Static and dynamic security

Dynamic security rights are known in German law with respect to the retention of ownership and the security transfer of ownership and the security assignment, respectively.[654] This is the response to the "dynamic nature" of the property taken as security.[655] The building blocks of retentions of ownership extended to future property and security transfers extended to future property which deal with dynamic property[656] are as follows: (1) Under the security transfer extended to future property the parties can take security over several assets by way of general description (this is clearly not necessary for a retention of ownership extended to future property which takes security primarily over an individual, purchased asset); however, under the principle of specificity the assets are transferred one by one; (2) both the retention of ownership and the security transfer are able to cover future property; (3) the person giving security remains free to deal in the assets both under a retention of ownership and a security transfer since he is provided with a respective power under § 185 BGB; (4) proceeds from a sale of the assets which are taken as security are assigned to the securityholder; (5) there is no conflict of priorities with later retentions of ownership or security transfers since the assets can in principle be transferred only once; however, in particular with respect to movable things German law provides for ways of good faith acquisition of an asset free from security rights. There is a weakness of both the retention of ownership and the security transfer which should be noted. The security right in the future asset is not created directly in the person of the securityholder ("*Direkterwerb*") but only indirectly, "one logical second" after the person giving security has acquired ownership or holdership in the asset ("*Durchgangserwerb*").[657] Hence, the securityholder bears the risk of an intervening insolvency of the person giving security.

---

[654] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 3 II 1 = p. 82, § 7 = pp. 181-209.

[655] Rolf Serick, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 3 I 1 footnote 7 = p. 77; § 7 I 2 = pp. 183; § 8 III 1 = p. 225.

[656] Rolf Serick (Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993), § 3 I 1 footnote 7 = p. 77) calls it "*dynamische (umsatzbestimmte) Waren*".

[657] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 6th ed. (Munich 1998), § 16 II 2 c = p. 293 for security assignments.

The real estate and appertunances which form the charged property of an accessory or non-accessory land mortgage[658] together with other elements of charged property included by operation of law form a so-called liability unit ("*Haftungsverband*"). This liability unit may expand or contract, as the case may be. The extensions of charged property may, therefore, provide a floating element to an otherwise static security right.

12.2.3.2 Additional charged property

12.2.3.2.1 Agreement between the parties

12.2.3.2.1.1 Proceeds of sale

German law does not allow for an automatic extension of security rights to proceeds of sale. Several cases can be distinguished: (1) The **simple possessory pledge** in movable assets (§ 1205 [1] BGB) does not allow for a sale of the pledged property. The possession of the asset is kept by the pledgeholder. A transfer of ownership in the pledged property would terminate the pledge (§ 1242 [2] first sentence BGB) if the pledged property is transferred according to the procedure of a sale of pledged property. (2) Where the pledged property is not in the direct possession of the pledgeholder but is kept by a third party and the pledgeholder holds **constructive possession** only ("*Besitzkonstitut*", § 1205 [2] BGB) a transfer of the pledged property again terminates the pledge (§ 1242 [2] first sentence BGB) if the pledged property is transferred in accordance with the applicable procedure. A sale of the pledged property can result in a breach of the pledge agreement. (3) For **accessory and non-accessory land mortgages** a transfer of ownership in the mortgaged land is not expected. Any such transfer can result in a termination of the mortgage if the mortgage is not registered in the land register and the acquirer acquires in good faith with respect to the non-existence of the mortgage (§ 892 [1] first sentence BGB). (4) **Retention of ownership** and **security transfer of ownership** both can be structured in a way that they take into account proceeds of sale (they are then extended to future property). In such a case the person taking security allows to transfer ownership in future property. In exchange the

proceeds from the future sales price are assigned in advance (§ 398 BGB, "*Vorausabtretung*") to the person taking security in the initial charged property. This structure is called an extended retention of ownership or security transfer of ownership ("*verlängerter Eigentumsvorbehalt*", "*verlängerte Sicherungsübereignung*").

12.2.3.2.1.2 Products

As far as retention of ownership and security transfer of ownership are concerned, ownership of assets which underwent manufacturing, assembling and commingling ("*Verarbeitung, Verbindung und Vermischung*") is determined by general property law (§§ 946-950 BGB). Movable assets which are used in the **manufacturing** process become owned by operation of law by the manufacturer (§ 950 BGB). Under German law under no circumstances the security right will extend to a manufactured product by operation of law. An agreement between the parties is necessary. The issue who manufactures an asset can be determined contractually ("*Verarbeitungsklausel*"). Such a clause may determine the securityholder to be the manufacturer of a good and hence may result in him becoming the owner.

Where movable things are **assembled or commingled** it is important to know whether one of the assets can be regarded as the main asset ("*Hauptsache*"). The owner of the main asset becomes also owner of any thing assembled and commingled (§§ 947 [2], 948 [1] BGB). Otherwise the owners of all assembled and commingled assets become joint owners of the new thing *pro rata* to the value of their respective things at the time of assembling or commingling (§§ 947 [1], 948 [1] BGB). Agreements are not possible.

12.2.3.2.2 Operation of law

German law deals with security in **fixtures** ("*wesentliche Bestandteile*") to land in the general part of the civil code.[659] The owner of a fixture becomes in principle owner of the land. Pursuant to § 93 BGB fixtures (to movable things) are included with retention of

[658] For the extension to appertunances see chapter 12.2.3.2.2.
[659] See §§ 93-95 BGB.

ownership clauses[660] and security transfers of ownership. § 1120 and §§ 1192 (1), 1120 BGB include **appertunances** (*"Zubehör"*) in accessory and non-accessory land mortgages. § 97 BGB attaches appertunances to any movable and immovable things so that they are also included with pledges in movable things,[661] retentions of ownership[662] and security transfers of ownership. § 1120 and §§ 1192 (1), 1120 BGB include **fruits** (such as the dividends of a right) in accessory and non-accessory land mortgages. §§ 1213, 1214 BGB contain the respective provisions for pledges in movable things. In cases of doubt fruits are – pursuant to § 99 BGB – also included in retention of ownership clauses[663] and security transfers of ownership. § 1127 (1) BGB, a provision dealing with accessory land mortgages, includes **insurance claims** in the charged property.[664] The extension to insurance proceeds compensates the securityholder for the loss of charged property. Therefore, the extension terminates once the charged property is restituted or replaced.[665] German law knows **other cases of real subrogation** than the extension of charged property to insurance claims.[666]

12.2.4 Model Law on Secured Transactions

12.2.4.1 Principal charged property

The parties can freely determine the extent of the charged property under the model law.

12.2.4.1.1 One or more assets

12.2.4.1.1.1 One asset

---

[660] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 9 II = p. 144.
[661] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 6 II 3 = p. 100.
[662] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 9 II = p. 144.
[663] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 9 III = p. 144.
[664] Pursuant to § 1192 (1) BGB, § 1127 (1) BGB is also applicable to non-accessory land mortgages.
[665] § 1127 (2) BGB.

Pursuant to art. 5.1 the charged property can be a single asset.

12.2.4.1.2.2 Several assets

Charged property can also be several assets or a changing pool of assets.[667] A changing pool of assets comprises a whole enterprise (art. 5.6) for the model law also allows to take an enterprise charge, i.e. a charge over all property of an enterprise (article 5.6) or a part of it and to sell the enterprise or its part in any enforcement proceedings as a whole (article 25). There is no requirement of specificity under the model law like under German law. The model law propagates the globality principle in the sense that one security interest can cover several assets. However, an exception from the globality principle clearly exists for the unpaid vendor's charge (art. 9.1) which will cover the movable thing sold to the purchaser.

In order to avoid any confusion the model law intentionally avoided the term "fixed charge" and used "specific charge" instead. Equally the English term "floating charge" was avoided under the model law. The model uses instead the terms "class charge" and "enterprise charge".

12.2.4.1.3 Maximum value of charged property

Whereas the model law has provided for a maximum value with respect to the secured debt,[668] there is no such requirement with respect to charged property. There is neither a requirement that the amount of the secured debt and the value of the charged property have to be in a certain proportion.

12.2.4.1.4 Static and dynamic security

---

[666] See for real subrogation under German law generally Peter Bassenge in Palandt, Bürgerliches Gesetzbuch, 62th ed. (Munich 2003), vor § 854 no. 20.
[667] Art. 5.1 and the model law's official commentary to art. 5.5.
[668] Art. 4.5.

Under the model law the parties can agree on a dynamic charge with respect to charged property since the model law provides for all seven building block of such a dynamic right: (1) The parties are able to secure not only a single but also several assets (art. 5.1); (2) they are able to secure future property (art. 5.8, 5.9); (3) they are able to describe the charged property generally (art. 5.5 second case); (4) security over future property obtains the same priority as security over present property taken at the same time; (5) the person giving security has in principle the power to use and to dispose of charged property (arts. 15.2, 19-21); (6) flexibility is enhanced even further by a rule of internal law which provides that a charge which is created whether or not charged property is inside or outside the jurisdiction of creation (art. 5.7); and (7) lastly, the insolvency principle in art. 31 no. 2 can be interpreted in a way that it recommends that there should be no general provisions on fraudulent conveyances in insolvency proceedings which prevent a dynamic charge. However, the accrual of charged property under future property clauses can be assumed to be terminated at the latest at the time that insolvency proceedings are opened.

12.2.4.2 Additional charged property

12.2.4.2.1 Agreement between the parties

12.2.4.2.1.1 Agreements in general

Under the model law the parties are free to describe the charged property. Property which is to be secured by a security interest in addition to the principal or initial charged property can be dealt with contractually by the parties to the security agreement. This agreement may override law providing for additional property[669] unless it does not comply with mandatory law.

12.2.4.2.1.2 Proceeds of sale

The most important case of an extension of charged property is the extension to proceeds of sale (and the related payment claims respectively). Many businesses constantly buy and

sell goods. If they have given security over the goods sold they will need a licence to deal in them[670] in order to sell free from the security right. In exchange for the sale of the goods they will either receive a claim to the sales price or they will receive the proceeds of sale.[671] The securityholder will only receive adequate protection by a security right if the charged property extends not only to the goods but also to the payment claims and to the proceeds of sale. Under the model law the protection of the securityholder can easily be achieved by describing the charged property in a way which includes payment claims and proceeds of sale.

12.2.4.2.1.3 Products

It is difficult for a model law to lay down rules for the effects of manufacturing, assembling and commingling of movable things because their effects will ultimately depend on the underlying property law as we have just seen. The solution under the model law, therefore, ultimately relies on the agreement between the parties (unless national law provides for an automatic extension of charged property by operation of law). It is clear from Art. 32.1.4 that a charge over the raw materials terminates when those materials are used. This is the case for all types of charges, i.e. registered, possessory and unpaid vendor's charges.[672] Art. 15.3.1 confirms for the legal relationship between the parties that in principle the chargor has the right to "apply the charged property in any manufacturing process". The parties may, however, prevent the automatic termination of the charge by describing it in a way which extends it to the manufactured product (art. 5.1, 5.5). This is why we said that the model ultimately relies on the agreement between the parties.

12.2.4.2.2 Operation of law

Art. 5.2 second sentence extends the charge to **fixtures**.

---

[669] See art. 4.6: "unless otherwise agreed between the chargor and the chargeholder".
[670] See art. 19.2 provides a **legal** licence to transfer charged property.
[671] Either in the form of tangible money or in the form of book money in a bank account.
[672] Note, however, that in the case of an enterprise charge the charge will continue in the new assets by virtue of them becoming property of the company!

Immovable property, such as buildings, may have movable property (called **appurtenances**) fixed to it which does not by operation of law form part of the property. Under the model law appurtenances can be included in the charged property by agreement of the parties (see art. 5.1, 5.5). **Fruits** (such as the dividends of a right) are in principle covered by the charge (art. 15.3.2).

Rights under an insurance contract (but not insurance proceeds) are included in charged property by operation of law without requiring further agreement between the parties.[673]

The national law may know other cases of **real subrogation** than the extension of charged property to insurance proceeds.

12.3.1 Legal principles

12.3.1 Analytical principles

Two principles mark the extremes in which the issue of the extent of the charged property can be dealt with: whilst under the maximum principle the charged property is extended as far as possible, under the limitation principle the extent of the charged property is limited.

12.3.1.1 Principal charged property

12.3.1.1.1 One or more assets

Most laws examined in this study provided for security in both one single asset and several assets. This extended even to changing pools of assets.[674] Limits where, however, set by the requirement of specificity under English law where the Bills of Sale Acts applied and under German law which followed the principle of specificity generally. Although it was possible

[673] See art. 5.10.

[674] Ulrich Drobnig ("Study on security interests" and "Legal principles governing security interests [study prepared by Professor Ulrich Drobnig of Germany] in 1977 UNCITRAL Yearbook vol. VIII, part two, II, A, 2.3.4.3 = pp. 188-9) refers to "complex units" in this respect.

under a German security transfer to take security in several assets by way of general description technically there were as many security transfers as there were assets.

12.3.1.1.2 Maximum value of charged property

Under none of the legal systems examined in this study it was necessary to provide a maximum amount of the charged property by way of agreement.

The securityholder will try to cover the secured debt by taking security in property of adequate value. It will choose assets of real economic value, i.e. those assets which can be realised. In practice there will be a security-margin, i.e. the property taken as security will be more valuable than the amount of the charged debt, because the charged property may not be realised for its full value. It is exactly the issue of a security margin which is addressed under German law by the rules of overcharging. No other legal system examined in this study featured similar rules.

12.3.1.1.3 Static and dynamic security

There are seven building blocks which are required for providing a security right which is fully dynamic in relation to charged property and, therefore, covers a changing pool of assets. (1) The parties must be able to secure not only a single but also several assets; (2) they must be able to secure future property (American law speaks of "after-acquired property"); (3) they must be able to describe the charged property generally; (4) security over future property must obtain the same priority as security over present property taken at the same time; (5) the person giving security must in principle have the power to use and to dispose of charged property; (6) flexibility can be enhanced even further by a rule of internal law which provides that a security right is created whether or not charged property is inside or outside the jurisdiction of creation; (7) lastly, there should be no general provisions on fraudulent conveyances in insolvency which prevent a dynamic security right.[675]

The legal systems examined in this study all provided in addition to traditional static security interests dynamic security interests. However, they dealt with the different building blocks of a dynamic security interest in different ways. The floating charge or floating mortgage of **English law** (which can be extended to the assets of a whole company) was defined by building block No. 5, the chargor's management power (and not by the type of description of the charged property as one might assume based on the term used). English law also allowed for building blocks Nos. 1-3. However, it did not implement building block No. 4, since fixed charges could take priority over any prior floating charge and the floating charge did not translate into a fixed charge until a so-called crystallisation event occurred. A similar approach is chosen for the Quebec floating hypothec under which the effects of the hypothec are suspended until an crystallisation event occurs.[676] Floating interests which require a crystallisation event are no proprietary rights (rights *in rem*) before this event occurs.[677] In practice this often leads to a combination of fixed and floating security rights over the same charged property because only the fixed security right gives adequate priority.

The security interests under **Article 9 UCC** (the floating lien) and the **model law** encompassed most of the building blocks of a dynamic security interest. They were able (1) to cover several assets, (2) to secure future property and (3) to describe charged property generally; (4) they also provided to the person giving security the power to use and dispose of the charged property; (5) extended the security interest in exchange to proceeds;[678] (6) they also featured simple registration or notice filing systems and could (7) also cover future debts (i.e. offered a dynamic security interest also with respect to the secured debt). (8) Both Article 9 UCC and the model law have refrained from the concept of crystallisation found under English law. Under the model law a charge covering a pool of assets is valid security from the time of agreement and registration[679]. This concept is

---

[675] See chapter 11.2.2.2 above for the problems following the decision Benedict v. Ratner under US law.
[676] See art. 2715 (1) civil code of Quebec.
[677] Ulrich Drobnig, Empfehlen sich gesetzliche Maßnahmen zur Reform der Mobiliarsicherheiten? Gutachten F für den 51. Deutschen Juristentag (Munich 1976), pp. F 83 f.; Manfred Wenckstern, Die englische Floating Charge im deutschen Internationalen Privatrecht in 1992 RabelsZ 56, pp. 624-95 (650); Jan-Hendrik Röver, Prinzipien, § 9 II 3 e = pp. 149-50.
[678] In this respect it should be noted that the definition of "proceeds" under Article 9 UCC extends beyond mere proceeds of sale.
[679] Where registration is required.

accompanied by provisions about the time of creation of the charge. The main idea is that a charge is only enforceable from the time that the person giving the charge becomes owner of the secured property. Similarly under Article 9 UCC the first-to-file-or-perfect rule also had to be applied with respect to future property.

German law, although it was not completely hostile towards dynamic security rights with respect to rights and movable things, allowed them only in the form of security transfers of ownership extended to future property and retentions of ownership extended to future property. It implemented not all building blocks of a dynamic security interest. Security over several assets was conceptually limited by the principle of specificity. Another feature was the indirect acquisition of ownership or holdership to secured property (and hence the security) by the securityholder with respect to security transfers and retentions of ownership.

12.3.1.2 Additional charged property[680]

12.3.1.2.1 Proceeds and products

In the legal systems examined in this study we found two different approaches to additional charged property, in particular proceeds and products.[681] Under the common law systems **English law and American law** an extension of charged property is provided by operation of law (with the purchase money security interest under American law being a somewhat special case). **German law** (but retention of ownership and security transfers extended to future property only) and the **model law**, on the other hand, opted for a contractual approach. More generally property additional to the principal charged property will often be dealt with contractually by the parties to the security agreement. Such agreements will often override legal provisions on additional property unless it does not comply with

[680] For a comparative overview of extensions of charged property see Doc. A/CN.9/131 and annex, "Study on security interests" and "Legal principles governing security interests (study prepared by Professor Ulrich Drobnig of Germany) in 1977 UNCITRAL Yearbook vol. VIII, part two, II, A), 2.3.4.2 = pp. 187-8.

[681] The difference in approach has also been observed by Karin Milger, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982), p. 55 but only with a view to the difference between American law (extension by operation of law) and German law (extension by way of agreement).

mandatory law. Often the parties will either exclude any additional property provided for by operation of law, or they will alter additional property legally provided for or, lastly, will provide for additional property which is not dealt with in the law. Where the parties provide for additional property by way of agreement they will have to comply with the rules which apply to the principal charged property, they will in particular have to describe and to identify it. Under the model law the extension by way of agreement was part and parcel of the great freedom the parties were given with respect to describing and identifying the charged property. Under German law we found that the category of products had to be differentiated further into manufacturing on the one hand and assembling and commingling on the other hand. Only for manufactured products an extension could be agreed between the parties. The consequences of assembling and commingling were determined by operation of law.

12.3.1.2.2 Fixtures and appertunances

Fixtures are things which are related to other things by operation of law. Legal systems are generally careful in ensuring that a thing which appears to be an economic unit and functions as a single thing includes other things which from their appearance may be said to be separate. They may be related in such a way at the time of creation of security or become related subsequently. Legal systems sometimes deal with security in fixtures to land in the law of movable security and sometimes in the law of immovable security. Under American law fixtures could be created either under real estate law or under Article 9 UCC. Article 9 UCC treated fixtures as a separate asset and allowed to create individual security rights which were generally independent of the rights created in real estate. Quite different was the approach under German law where fixtures were included in the charged property of an accessory or non-accessory land mortgage by operation of law. They were equally included in the charged property of retentions of ownership and transfers of ownership.

German law had specific rules with respect to **appurtenances, fruits** and **insurance proceeds.**

12.3.2 Normative evaluation

12.3.2.1 Principal charged property

12.3.2.1.1 One or more assets

12.3.2.1.1.1 One asset

Charged property may be an **individual** asset. As we have seen under German law pursuant to the doctrine of **specificity** this is in principle the only possibility for most security rights: they can only be created over a single asset. According to the doctrine of specificity a property right (which may be ownership or a limited property right such as a security right) can in principle relate only to one single, legally separate asset and cannot cover, for example, a library as a whole. Its general purpose is to clarify proprietary relationships as far as possible.[682] Examined more closely the doctrine of specificity comprises **two** meanings. First, it refers to the legal relationship between a holder of a property right and an asset. In this respect it is certainly true that a legal relationship must exist between a holder of a right and a certain asset. In the end every legal relationship must be a "specific" one because it is the essence of proprietary relationships that there is a direct relationship between a person and an asset.[683]

A second aspect of specificity is whether or not proprietary relationships with several assets can be summarised not only in **one** agreement but also in **one** right. Where the doctrine of specificity applies there are in principle as many security rights as there are secured assets! Although this aspect of the doctrine of specificity seems to pose difficulties for security in several assets its practical role is minimal nowadays. It is recognised for most types of security that several assets can be taken as security by way of general description. For example security assignments of receivables and security transfers of ownership may cover classes of assets (e.g. the "contents of a warehouse"). There are also a number of explicit provisions which permit even a single security right over several assets of the same type.

---

[682] Fritz Baur, Lehrbuch des Sachenrechts, 12th ed. (Munich 1983), § 4 III = p. 32.
[683] See chapter 7.2.1 above.

Having gone thus far the concept that security rights can in principle exist only in single assets is an unnecessary complication which can safely be disregarded nowadays. The second aspect of the doctrine of specificity is an unnecessary restriction on the law of secured transactions because it leads to a narrow understanding of security rights which tends to relate a property right only to a single asset. Even more irritating is its inadequacy for situations where pools of assets are charged. It should be possible to create a security right not only in a single asset but also in several assets.

12.3.2.1.2.2 Several assets

If there are no concerns on the grounds of the doctrine of specificity it becomes possible to take security over several assets and such security can be consolidated in one single right.[684] Examples for security over several assets are security in the property of traders and security over the assets of an enterprise. English law recognised both security interests in pools of assets and security in the assets of a company (both under the regime of the floating charge or floating mortgage). However, the limited proprietary effect (caused by the need for a crystallisation event) severely limited the effect of the floating charge. More adequate seemed the floating lien under Article 9 UCC and the charge under the model law which provided a security interest with full proprietary effect to the securityholder.

The disadvantage of a law which allows a wide scope of charged property (particularly with respect to future assets) is that too many random assets of the person giving security may be tied down which may lead to excess security, limiting severely the use of (future) assets to obtain further credit.[685] The person giving security must have this danger in view when negotiating with the securityholder. However, any such danger should not be an argument against introducing security interests over several assets.

Security interests in the assets of companies are a special issue for which we found two approaches. English law and the model law allowed such security interests, whereas they

[684] With the obvious limitation that a security right may be limited to certain types of property; see principle of multiplicity chapter 7.5 above.

were unknown under American and German law. Generally speaking the security interest in the assets of companies is of great use as long as it is given full proprietary effect.

12.3.2.1.3 Maximum value of charged property

The rules on overcharging discovered in the context of German law seem to be counterproductive in the context of a security law – even after the groundbreaking decision in BGHZ 133, 25. First, there is the issue of determining the value of the charged property. The parties will often not know the exact value of charged property because there is no transparent price determination mechanism for many assets. Even the quality of receivables (i.e. their default and loss on default ratios) is difficult to determine. Hence, the basis for the issue of overcharging is doubtful itself. But even if the parties may be able to form an understanding and to agree on the value of charged property it has to be borne in mind that security is not always taken with a view to enforcement. In the context of modern financings security often assumes a passive character and is used to exclude third parties from their access to certain asset.[686] This is particularly true for financings of special purpose vehicles (for example in the context of leverage buy-out transactions or project financings[687]). In these transactions it is indispensable that the financier takes security over all the assets of the special purpose vehicle in addition to a pledge over the shares of the shareholders in the special purpose vehicle.[688] The value of the security is secondary to the need to isolate and stabilise the basis of the financing in the form of the special purpose vehicle's cash flows. The rules of overcharging are particularly inappropriate for such situations but would undoubtedly apply.

---

[685] Jan Hendrik Dalhuisen, International Aspects of Secured Transactions and Finance Sales Involving Movable and Intangible Property in D. Kokkini-Iatridou and E.W. Grosheide (eds.), Eenvormig en Vergelijkend Privaatrecht 1994 (Lelystad 1994), pp. 405-46 (413).

[686] See Jan-Hendrik Röver, Prinzipien, § 9 III 1 footnote 823 = p. 156. See also Jan-Hendrik Röver, Projektfinanzierung in Ulf R. Siebel (ed.), Projekte und Projektfinanzierung (Munich 2001), chapter 6.2.6.10.3 = p. 223 on the negative function of termination rights under project finance loan agreements. Rights attached to events of default under such loan agreements are the necessary basis for related security rights. It is evident that these financings are based on a twofold negative use of legal rights: both events of default and security rights.

[687] Bernd Fahrholz, Neue Formen der Unternehmensfinanzierung. Unternehmensübernahmen, Big ticket-Leasing, Asset Backed- und Projektfinanzierungen (Munich 1998).

[688] The latter security interest provides the financiers so-called "insolvency remoteness" from an insolvency of the shareholders of the special purpose vehicle.

12.3.2.1.4 Static and dynamic security

We have seen that security can be dynamic in relation to the secured debt.[689] However, it can be equally dynamic in nature in relation to charged property. It appears particularly important to allow the parties to create security in a changing pool of present and future property which changes its composition during the lifetime of the security and the final components of which are not yet known at the time of the security right's creation. A shortfall in any of the building blocks of a dynamic security interest[690] seriously limits the risk reducing function of that security interest. An examination of the dynamic security interests showed a similarity in approach between Article 9 UCC (floating lien) and the class charge under the model law. Both seemed to deal adequately with the requirements of a modern dynamic security interest. Too weak was the floating charge or floating mortgage under English law since it required an additional fixed charge to provide full proprietary protection. Equally inadequate seemed the solution under German law which was restricted by the principle of specificity as well as by the feature of an indirect acquisition of the secured property.

12.3.2.2 Additional charged property

12.3.2.2.1 Proceeds of sale

The most important case of an extension of charged property is the extension to proceeds of sale (and the related payment claims, respectively). Many businesses constantly buy and sell goods. If they have given security over the sold goods they will need a licence to deal in them[691] in order to sell free from the security right. In exchange for the sale of the goods they will either receive a claim to the sales price or they will receive the proceeds of sale.[692] The securityholder will only receive adequate protection by a security right if the charged property extends not only to the goods but also to the payment claims and to the proceeds of sale. The two different approaches which we found with respect to proceeds of sale – the

[689] See chapter 9.3.1.1.3 above.
[690] For the building blocks see chapter 12.3.1.1.2.4 above.
[691] See art. 19.2 of the model law which provides a **legal** licence to transfer charged property.
[692] Either in the form of tangible money or in the form of book money in a bank account.

contract principle and the principle of creation by operation of law – seem to be neutral from the point of view of security law.

12.3.2.2.1.3 Products

Another important case for the extension of charged property occurs in relation to the manufacturing, assembling and commingling of goods. One may take as an example a supplier who has delivered leather and taken security rights over these goods. The leather is then manufactured to shoes. Does the security interest in the leather terminate or does it continue over the shoes?

Also with respect to products we found the same two approach as with proceeds of sale – the contract principle and the principle of creation by operation of law. They seemed again to be neutral from the point of view of security law. A special feature of the **American solution** is that to a certain extent parallel security interests remain with the debtor, its unsecured creditors and other secured creditors. The result is not beyond doubt particularly when the value of the product is far lower than its costs.[693] Not satisfactory is also that there is no special priority rule for conflicts between a supplier and another secured creditor whose security interest covers after-acquired property of this kind. Here the general priority rule of § 9-312 (5) UCC[694] is applicable.[695] Also the differentiation between manufacturing on the one hand and assembling and commingling on the other hand – which we found under **German law** – seemed not to be particularly logical. It seemed more appropriate to find a simpler solution which relies more on the agreement between the parties (as far as security law is concerned and as long as the parties act not against the interests of third parties).

13 The relationship between charged property and security interest

[693] Grant Gilmore, Security Interests in Personal Property, vol. II (Toronto, Boston 1965), pp. 852-3.
[694] See chapter 12.2.2.2.2.1 above.

13.1 Legal issue

We have seen that the security right is often closely dependent on the debt it secures. Similarly the issue of the relationship between the security right the charged property has to be addressed. This relationship is the necessary consequence of the security interest having a proprietary nature, i.e. creating a link between a person and specific assets. Similar to the dependency between secured debt and security right the relationship between security right and charged property has various aspects. (1) The charged property may have to exist in order for the security interest to become **created**, (2) any changes in the charged property may influence the **extent** of the security interest, (3) any **transfer of title to or ownership in** the charged property may affect the charged property, (4) any **defence** against rights to the charged property may also be held against the security interests, (5) changes in the charged property may **terminate** the security interest, and lastly (6) the nature of the charged property may influence the security interest in **enforcement proceedings.**

13.2 Legal solutions

13.2.1 English law

13.2.1.1 Creation

The attachment of a security interest under English law requires a present interest in the asset or the power to give the asset as security.[696] As we have seen, security (but not a retention of title) can in principle also be taken in future property[697] but this creates only an inchoate security interest until a present interest is acquired. It should also be remembered that present property includes so-called "potential property".[698]

13.2.1.2 Extent

---

[695] Grant Gilmore, Security Interests in Personal Property, vol. II (Toronto, Boston 1965), pp. 855-6. A further problem of the US-American solution is the overlap between § 9-315 UCC and § 9-314 UCC; see Grant Gilmore, *op. cit.*, pp. 849-51.
[696] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 2 = p. 678, 23 2 (iii) = pp. 682-3.
[697] Chapter 11.2.1.2.
[698] Chapter 11.2.1.2.

Under English law the extent of a security interest fluctuates with the extent of the charged property unless the security interest is a possessory pledge.

13.2.1.3 Transfer of title

The rule of the common law is that only the legal titleholder of goods or the legal holder of rights or one who has been authorised or otherwise held out as entitled to dispose of them can make a disposition which will be effective to divest the legal titleholder of his security interest.[699] However, there are exceptions to the *nemo dat* rule. E.g. the sale of charged property by a mortgagee in exercise of his statutory powers transfers to the purchaser not merely the mortgagee's legal interest but the mortgagor's equitable title. Similarly, a sale by a pledgee in exercise of his common law power of sale conveys the title of the pledgor. Important is also the exception for assignments (including security assignments): Where the same debt is assigned to two different purchasers in succession and the second purchaser takes in good faith and is the first to give notice to the debtor, he acquires title in the debt in priority to the first assignee despite the fact that as a result of the first assignment the original creditor had nothing left to assign.[700] Of relevance are also the general exceptions to the *nemo dat* rule for general sales of goods, in particular the common law exceptions with respect to apparent authority and apparent ownership as well as a number of statutory exceptions such as sec. 23 Sales of Goods Act or sec. 2 Factors Act 1889.[701]

13.2.1.4 Defences

Defences against title and interest in charged property affect directly the security interest.

13.2.1.5 Termination

[699] *Nemo dat quod non habet*; Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 11 (iii) (a) = p. 60.
[700] Roy Goode, Commercial Law, 2nd ed. (London 1995), 2 11 (iii) (a) = p. 60.
[701] See in general Roy Goode, Commercial Law, 2nd ed. (London 1995), 16 2, 3 = pp. 451-82.

A security interest terminates upon a sale of the charged property free from the security interest[702] as well as upon destruction of the charged property. However, a mere impairment of the charged property does not lead to a termination of the security interest. Equally a commingling of the charged property with other assets does not necessarily lead to a termination of the security interest; however, the security interest survives only if the charged property remains identifiable.[703]

13.2.1.6 Enforcement

In enforcement proceedings the chargee, mortgagee or pledgee has the power to sell the charged property but in particular the equitable mortgagee and the chargee must apply to a court for an order of sale.[704] A mortgagor (and only he) has the right to redeem the mortgaged property at any time by tender of the amount due, with accrued interest.[705] Lastly, the creditor may upon default appoint a receiver[706] or – under the new provisions of the Enterprise Act 2002[707] - an administrator or – in the case of a qualifying floating charge – an administrative receiver.

13.2.2 American law

13.2.2.1 Creation

In principle, security interests under American law attach only if the collateral exists at the time of attachment. This is supported by § 9-203 (b) (2) UCC according to which attachment requires that "the debtor has rights in the collateral or the power to transfer rights in the collateral to a secured party". It follows further from § 9-502 (a) (3) UCC according to which the filing statement must indicate the collateral.[708] However, as already

[702] See already chapter 13.2.1.3.
[703] Chapter 12.2.1.2.2.
[704] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 4 (ii) = pp. 690-1; see also chapter 13.2.1.3 above.
[705] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 4 (iii) = p. 692.
[706] Roy Goode, Commercial Law, 2nd ed. (London 1995), 23 4 (iv) = pp. 692-3.
[707] See chapter 6.3.
[708] See also the wording in § 9-203 (e) (1) UCC: "existing or after-acquired property".

discussed,[709] the UCC allows security interests generally in after-acquired, i.e. future, property as well.

13.2.2.2 Extent

Security interests are dependent on the extent of the collateral. § 9-205 UCC acknowledges that the extent of the collateral may change since the debtor may have the right to use, commingle and even dispose of all or part of the collateral[710] or the proceeds[711] unless the security interest is possessory in nature[712]. Changes in the extent of the collateral are also implicitly recognised by § 9-210 UCC according to which a secured party may request a list of collateral.

13.2.2.3 Transfer of title

In principle a security interest survives the transfer of collateral by the debtor to a third party unless a sale free of the security interest is authorised by the secured party.[713] This principle is confirmed further by § 9-205 (a) (1) (A) UCC pursuant to which a security interest is not invalid because the debtor has the right to dispose of all or part of the collateral and by § 9-507 (a) UCC which confirms that a filing statement remains effective with respect to collateral that is sold (even if the secured party knows or consents to the disposition).[714] Also a security interest attaches to identifiable proceeds of the collateral.[715] The security interest will terminate not only if the secured party consents to a sale of collateral free of the security interest but also if the purchaser qualifies as a buyer in ordinary course of business (and even if the purchaser is not in good faith).[716] The security interest becomes subordinate to the rights of a purchaser if the secured party has not perfected the security interest and a third party acquires the collateral for value and without

[709] Chapter 11.2.2.2; see § 9-204 UCC.
[710] § 9-205 (a) (1) (A) UCC.
[711] § 9-205 (a) (1) (D) UCC.
[712] § 9-205 (b) UCC.
[713] § 9-315 (a) (1) UCC; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 3.02 [3].
[714] For § 9-507 (a) UCC see Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 2.11. [1] [a].
[715] § 9-315 (a) (2) UCC.

knowledge of the security interest.[717] It should be noted that pursuant to § 9-401 (b) UCC an agreement between the secured party and the debtor which prohibits a transfer of the debtor's rights in collateral does not prevent the transfer. Notwithstanding any claim in damages of the secured party against the debtor the transfer will thus be effective in any event and its consequences on the security interest will depend on whether or not the requirements of § 9-320 UCC or § 9-317 (b) UCC are fulfilled.

13.2.2.4 Defences

Defences are referred to in § 9-403 UCC which deals with agreements not to assert defences.[718] Defences arising from rights in the collateral affect the security interest.

13.2.2.5 Termination

A security interest may terminate if the requirements for its termination described in chapter 13.2.2.3 are met. It also terminates upon the destruction of the collateral (although in such a case the security interest may only be inchoate and come to life again once a new piece of collateral comes under the security interest, e.g. under an after-acquired property clause). Heavily litigated is the defence of an impairment of collateral under Article 9 UCC.[719] § 3-606 (1) (b) UCC provides that the holder of a note discharges any party to the note „to the extent that without such party's consent the holder [...] unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse". Hence, if the creditor impairs the Article 9 UCC security interest, the guarantor is discharged to the extent of the impairment. Beyond the conflict between guarantor and secured parties an impairment of collateral reduces the extent of the security interest (in effect its value) to the extent of the impairment. Upon commingling of

---

[716] § 9-320 UCC.
[717] § 9-317 (b) UCC.
[718] So-called "cutoff" or "waiver of defense" clause; Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 4.03 [3] [b] [xx].
[719] Barkley Clark, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf), 4.03 [3] [b] [xiii].

collateral with other goods the security interest in the collateral may terminate but continue in the product.[720]

13.2.2.6 Enforcement

In enforcement proceedings three different events may lead to a termination of the security interest:

(1) Where a secured party disposes of collateral after the debtor's default the security interest is discharged.[721] Even if the secured party fails to comply with procedural requirements set out by the Code the transferee can acquire free of the security interest if he acts in good faith.[722]
(2) The secured party may retain the collateral in satisfaction of the secured obligation which will equally discharge the security interest.[723]
(3) Lastly, the debtor may itself redeem the collateral pursuant to § 9-623 UCC which will – although not explicitly mentioned in the Code – discharge the security interest.

13.2.3 German law

13.2.3.1 Creation

Most security rights under German law (such as accessory and non-accessory land mortgages, retentions of ownership, security transfers of ownership) require for their creation that charged property exists at the time of creation of the security right. Only security transfers of ownership covering future property (including security transfers of generally described pools of assets) and the pledge allow security in future property but become created in that property only once the property becomes owned by the person giving security.

[720] § 9-336 UCC; see chapter 12.2.2.2.2.2.
[721] § 9-617 (a) (3) UCC.
[722] § 9-612 (b) UCC.
[723] § 9-622 (a) (3) UCC,

13.2.3.2 Extent

Any security right under German law is dependent on the extent of the charged property. Principal charged property may only be destroyed or damaged.[724] An addition to principal charged property is – due to the specificity principle - possible only under exceptional circumstances.[725] Changes may, hence, occur in particular with respect to additional charged property. Accessory and non-accessory land mortgages provide in §§ 1120, 1121 BGB for a reduction of additional charged property (e.g. appertunances and fruits) ("*Enthaftung*").

13.2.3.3 Transfer of ownership

A transfer of ownership to charged property in principle does not affect the security right. However, the person acquiring ownership in charged property will acquire free from the security right[726] where the securityholder has granted a licence to deal in the charged property (which can be done either prior to [§ 183 BGB] or after the purchase [§ 184 BGB]) or where the purchaser acquires under the rules of good faith acquisition ("*gutgläubiger lastenfreier Erwerb*", § 936 [1] first sentence BGB for movable things and § 892 BGB for immovable things[727]).

13.2.3.4 Defences

Defences may exist against the person giving security having ownership or holdership in the charged property. E.g. the person having transferred ownership to the person giving security may have been a minor in the first place. In such situations the defence will also directly affect the security right.

---

[724] For the legal consequences see chapter 13.2.3.5 below.
[725] Such as an addition to real estate under § 890 (2) BGB ("*Zuschreibung*"); for priorities see, however, § 1131 BGB; Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 11 V 1 = p. 190.
[726] See Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 9 V = p. 152 for retentions of ownership.
[727] For the limited possibilities of acquiring rights in good faith under German law see chapter 11.2.3.1.2 above.

13.2.3.5 Termination

The security rights may terminate for multiple reasons which rest in the charged property. In particular retentions of ownership and security transfers of ownership may terminate due to assembling and commingling.[728] They may also terminate in the course of a manufacturing process (§ 950 [2] BGB) unless the parties have agreed a manufacturing clause.[729] Clearly the security right terminates where the charged property is completely destroyed. However, where the charged property is only damaged there is no reason to assume that the security right ceases. The provisions on pledge deal with a special case of potential damage. Where movable things are in danger of being spoiled ("*Verderb*" – e.g. where machines are in danger of becoming technically obsolete) the pledgor can claim exchange of the charged property (§ 1218 [1] BGB). The pledgee has the right to claim a public auction of the charged property. The other general case of a potential termination of a security right is the transfer of ownership in the charged property. Chapter 13.2.3.3 already dealt with this situation. The provisions on pledge also stipulate that the pledge terminates where the pledgee becomes the owner of the charged property (§ 1256 [1] BGB). However, the pledge may survive if the pledgee has a legal interest in such a continuation (§ 1256 [2] BGB).[730] A possessory pledge also terminates if possession is lost but only if the pledged property is handed back to its owner or the pledgor not if it is returned to a third party.[731]

13.2.3.6 Enforcement

German enforcement law[732] is quite complex and it would go beyond the scope of this study to examine the various ways of enforcing security rights. It must suffice to point out

---

[728] See chapter 12.2.3.2.1.3 above; Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 9 V = p. 152 for retention of ownership clauses.
[729] "*Verarbeitungsklausel*"; see chapter 12.2.3.2.1.3 above; Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 9 V = p. 152 for retention of ownership clauses.
[730] See for „*Rechte an eigener Sache*" footnotes 525 f.
[731] Hansjörg Weber, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994), § 6 IV = p. 111.
[732] For an introduction see Wolfgang Lüke, Zivilprozessrecht. Erkenntnisverfahren, Zwangsvollstreckung, 8th ed. (Munich 2003).

that German law distinguishes between the different types of rights enforced as well as the different types of assets into which is enforced and has, hence, different enforcement procedures for money claims against movable things, money claims against receivables and other movable property and money claims against immovable property.[733] Like in other legal systems charged property will in most cases be sold to third parties; the person giving security has an opportunity to redeem the charged property.

The enforcement procedure is court governed and leaves no room for private enforcement mechanisms.

13.2.4 Model Law on Secured Transactions

13.2.4.1 Creation

In principle charged property must exist at the time of creation of the security right (see art. 6.5.1: "owner of the charged property"). Where the charged property is future property under the model law the charge is not created before the property is owned by the person giving security. There is, however, a rule which for the purposes of priorities deems the charge to be created at the same time it would have been created for present property (art. 6.8).

13.2.4.2 Extent

The charge is in its extent dependent on the extent of the charged property (see art. 14.3 and art. 5.9 for future property). Where charged property (principal charged property as well as additional charged property) is either acquired or lost subsequently it will affect the extent of the security right depending on the description of the charged property by the parties.

13.2.4.3 Transfer of title or ownership

[733] We refrain from listing the various enforcement procedures for claims other than money claims.

A transfer of title to or ownership in charged property in principle does not affect the security right (see art. 21.1). This is one of the consequences of its proprietary nature.[734] The situation is similar to the relationship between secured debt and charge where, as we have seen, a transfer of the debt in principle leads to a transfer of the charge; upon the transfer of the charged property the charge will encumber the title of the purchaser of the secured asset and, hence, follow title to the charged property. Under exceptional circumstances, however, charged property will be transferred without the charge attached to it. In particular, where the person giving security has been given a legal (art. 19) or contractual licence (art. 20) to deal in charged property the charge will terminate (arts. 32.1, 21.2). It may also be possible that the national law implementing the model law provides rules of good faith acquisition or of acquisition in the ordinary course of business which enable to acquire charged property free from the charge.

13.2.4.4 Defences

Any defences which a party may have against the person giving security being the owner or holder of the charge property will directly impact the existence of the security right (see art. 6.5.1: "owner of the charged property").

13.2.4.5 Termination

The charge terminates if the charged property (1) ceases to exist, e.g. because of destruction (see art. 32.1.3); (2) is changed or incorporated with another thing or right in such a manner that it ceases to exist in identifiable or separable form (see art. 32.1.4); (3) becomes part of another thing or right in such a manner that the charged property and the other thing or right are transferable as a single item (art. 32.1.5); (4) becomes owned by the chargeholder (art. 32.1.6); (5) in the case of a possessory charge, if possession of charged property ceases (art. 32.1.8); (6) a third party acquires title to or ownership in charged property free from the charge outside enforcement proceedings (arts. 32.1.10, 21.2) or in enforcement proceedings (arts. 32.1.11, 26.1).

[734] See chapter 7.2.1 above.

13.2.4.6 Enforcement

In **enforcement** proceedings the liability of the debt is limited to the charged property which is again explained by the charge's nature as a property right.[735] Similarly in **insolvency** proceedings either the priority or the chargeholder's enforcement separate from the insolvency proceedings is limited to the charged property.

13.3 Legal principles

13.3.1 Analytical principles

Similar to the situation encountered with the secured debt where security interests under many national laws are dependent on the debt secured, the relationship between security interest and charged property has been found to be a close one. The relationship may be classified under the notion of "dependency principle" but this notion must be differentiated further. In view of this dependence it becomes again obvious that the security interest is a "framework right"[736] only.

13.3.1.1 Creation

In principle, security laws allowed security in both present and future property with English law classifying potential property as a class of present property.[737] An exception was found in particular under German law which limited security in future property to security transfers and pledges. Furthermore, under English and German security law which provided for retentions of title or ownership as a means of taking security the retention of title or ownership could only be created in present property. US-American security law and the model law did not provide for a retention of title.[738]

---

[735] See chapter 7.2.1 above.
[736] Ekkehard Becker-Eberhard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993), pp. 6, 13, 37 *et al.* speaks about "*Rahmenberechtigung*"; however, he uses the concept only in the context of the dependence of the security interest from the secured debt. For the origin of the concept of a "framework right" see 10.3.1.1 above.
[737] See already chapter 11.3.1.2.
[738] The model law translated retention of title or ownership clauses into an unpaid vendor's charge.

Where security in future property was allowed the legal systems had various ways of dealing with the issue of how the security interest was treated until the property became owned or held by the person giving security. Under English law the security interest remained inchoate but in any event kept its priority and under the UCC the security interest was not even created (i.e. did not attach) but kept again its priority.[739] German law qualified the security neither as created but kept its priority and, lastly, under the model law the security was not created but was deemed to be created for priority purposes.[740]

13.2.1.2 Extent

In principle, the security followed the extent of the charged property and in this respect was allowed to float with the changes of the extent of charged property with the obvious exception of possessory security (possessory pledges under English and German law as well as possessory charges under the model law and possessory security interests under the UCC). The model law made a particular point of highlighting that the extent of charged property was fully dependent on the parties' description of charged property. Legal systems which relied more on security detailed by written law (such as German law) distinguished between principal property and additional property. Changes were possible in principle only with respect to additional property but only as provided for by law.

13.2.1.3 Transfer of title or ownership

In principle a transfer of charged property did not affect the security. In this respect the situation could be compared to a transfer of a secured debt which equally resulted in the security remaining unaffected. However, in the exceptions to this rule legal systems differed. The principal difference was found in a reliance only on good faith acquisition (English and German law) or a reliance on an acquisition in the ordinary course of business without a need of good faith (US-American security law which allows in addition a good

[739] See chapter 11.2.2.2.
[740] Chapter 11.2.4.2

faith acquisition[741]). The model law took no decision as to the exceptions to the *nemo dat* rule since it simply referred to national property law (thus making it possible to acquire charged property free from a charge either in good faith and/or in the ordinary course of business). Legal systems concurred, however, in that the charged property could be transferred free of the security where the person giving the security in the first place had been given the authority or a license to do so either by contract or by operation of law. § 9-317 (b) UCC contained a rule specific to US-American security law: Where a security interest was not perfected and a purchaser acquired collateral without knowledge of the security interest (i.e. in good faith) the security interest did not terminate but became only subordinated to the rights of the purchaser.

13.2.1.4 Defences

All legal systems examined in this study agreed that defences against rights in the charged property affected directly the security. This was logical with a view to the security being proprietary in the first place. Only where there are full rights in the charged property the strong effects of proprietary security are justifiable.

13.2.1.5 Termination

Also with a respect to the events of a termination of security the various legal systems demonstrated a remarkable uniformity:

- a transfer of charged property free from the security clearly led to a termination of security (with the notable exception of § 9-317 [b] UCC which provided for a subordination of the security interest);
- destruction of the charged property equally terminated the security; however, under legal systems which allowed for broadly defined security (like English law, US-American law and the model law) the security could be inchoate and become newly effective if a new piece of charged property came under the security agreement;

[741] § 9-317 (b) UCC and below.

German law with its strict adherence to the principle of specificity[742] saw in those instances no room for an inchoate security right;

- Commingling, assembling and manufacturing equally terminated the security in the initial charged property; the model law made a distinction between cases in which charged property became changed or incorporated with another thing and cases in which it became part of another thing. All laws recognised situations where the security continued in the product; however, this continuation was sometimes already provided by law and required in other legal systems an agreement between the parties;[743]
- Another common event for the termination of security was the loss of possession where the security was possessory in nature;[744]
- Several legal systems (German law and the model law) provided for a termination of security where the charged property became owned by the chargeholder. However, German law allowed for a pledge to continue where the pledgee had a legal interest in the pledge continuing. Similarly German law had recognised a non-accessory land mortgage for the benefit of the owner which was created by operation of law, thus recognising a legal interest in the continuation of the accessory land mortgage in any event.

13.2.1.6 Enforcement

In enforcement proceedings the securityholder is – if he bases his claims on the security only - limited to enforcing against the charged property only. This is a logical consequence of the security being proprietary. In principle the securityholder was given the right to sell the charged property in an event of default under the secured debt (or another defined event of default in particular where the security was non-accessory like a non-accessory land mortgage under German law). English, US-American and German law also allowed the person giving security to redeem the charged property (a power not given to him under the model law). Both English law and the model law also allowed to appoint a receiver, an administrator or an administrative receiver (under English law) or an enterprise

[742] See chapter 12.2.3.1.1.1.
[743] See chapter 12.3.1.2.1.

administrator (under the model law). Lastly, US-American law provided the securityholder with the right to retain the collateral in satisfaction of the secured obligation.

13.3.2 Normative evaluation

The dependence between security right and charged property is mainly a consequence of the security right's nature as a property right.[745] In addition, it is a protection for third persons. As the security right gives the securityholder a privileged position in relation to third persons it is equitable that this position is limited to certain assets and does not cover all the assets of the debtor (however, there are also good reasons for allowing company charges).

13.3.2.1 Creation

The practical need for security over future property was already explained in chapter 11.3.2.2. Both English and German law were not seen to adequately address the risk-reducing function of security with respect to future property.

13.2.2.2 Extent

The risk-reducing function of security must always be implemented with an additional view to the practicability of taking security. Modern financings require a degree of flexibility for the parties, in particular they require that the extent of charged property can change during the life of the security without a need for the parties to renew registrations or filings or to change their agreement. Most legal systems examined in this study were in compliance with those requirements. However, the limitations of the principle of specificity under German law created serious practical limitations on the usefulness of security. Hence, limitations to changes in the extent of charged property should be avoided.

13.2.2.3 Transfer of title or ownership

---

[744] See explicitly art. 32.1.8 of the model law.
[745] See for the principle of property right chapter 7.2.1 above.

Clearly with a view to the risk-reducing function of security any exceptions to the *nemo date* rule must be kept to a minimum. In this respect it seems to be doubtful to allow a purchaser to take collateral free from a security interest if he acquires in the ordinary course of business, as is the case under the UCC.[746] A limitation to good faith acquisitions seems more adequate since it is the person purchasing the collateral which has to prove that it was in good faith. Not convincing are neither subordination rules like the one of § 9-317 (b) UCC since this rule creates only uncertainty to which extent the securityholder is still entitled to exercise its rights and there is an overriding need to protect good faith purchasers.

13.2.2.4 Defences

There is clearly a technical need to allow defences against rights in the charged property. Although such defences may be seen to reduce the risk-reducing function of security there cannot be a right which is based on a legally deficient entitlement.

13.2.2.5 Termination

The only termination event not common to the legal systems examined in this study was the charged property becoming owned by the chargeholder. This is evidently a situation where security in many cases will not be needed any longer. However, the German "legal interest" exception to this termination event had a point since it kept security alive which could be useful in future. However, such an exception would seem to require strict publicity either in the form of possession or in the form of registration since it cannot be allowed in the interest of third parties that such security continues as secret security.

13.2.2.5 Enforcement

The main issue with respect to enforcement was the concept of allowing some type of receivership. This is only necessary where a legal system provides for a global security

interest covering a pool of assets, mainly the assets of a company. Once such security is provided the receiver seems to be a natural addition to the legal framework since it cannot be in the interest of the person giving security or the security nor any other involved person that assets are sold one-by-one and thus the value of the assets is limited to their break-up value. The risk-reducing function of security calls clearly for a receiver for global security interests.

[746] § 9-320 UCC.

Part V
Summary and Results

This study had a twofold goal: (1) to introduce a method of comparative law which is particularly suited with respect to developing proposals for legal reforms and (2) to examine comparative principles of proprietary security related to the main elements of security. Thereby the study started from the two thesis' that (1) traditional methods of comparative law suffer from limitations and (2) it is possible to concentrate the complex issues of proprietary security in a set of legal principles which can be evaluated on the basis of economic principles.

1 Method of comparative law

1.1 Three dimensions of comparative law

With respect to the first goal, the introduction of a method of comparative law suited for assisting in legal reform, the study started with a distinction of three dimensions of comparative law, an analytical, an empirical and a normative dimension.[747] This distinction laid the foundation for the rest of the study and in particular the comparative method developed in this study since it demonstrated the scope of a comprehensive comparative method.

1.2 Analytical principles o comparative law

The study then introduced the **principles method of comparative law.**[748] Comparative legal principles, it was held, have to comply with four criteria: they have to be functional, positive, general and potentially universal. The intention behind introducing the concept of comparative legal principles was to improve the practicability of comparative law. The need for the development of the principles method of comparative law arose since in the

[747] Chapter 3.
[748] Chapter 4.

author's opinion the dominating methods of comparative law suffer from inherent limitations. Methods of comparative law fall into several classes. There are "methods" which assist in defining the scope of comparison (see the method of legal families and the method of types below), methods which deal with the criterion of comparison (the functional approach and Schlesinger's factual approach), methods which assume a certain result of the comparison (universalism) and methods which provide criteria for evaluating legal systems (Mattei's comparative law and economics approach). Lastly, there is a general approach of questioning the activity of comparative law as such (critical comparative law). All these approaches are, in the opinion of the author, not appropriate as shall be shown in the following brief discussion.

The still dominating „method" of comparative law is the **method of legal families** („*Rechtskreismethode*") which has been championed in particular by Konrad Zweigert and Hein Kötz[749] as well as René David[750]. The theory of legal families is a way of defining the scope of comparison, in particular of identifying the legal systems examined. The method of legal families groups legal systems into larger blocks where participating legal systems share a certain "style". The comparison can be facilitated, in the opinion of the method of legal families, by choosing "typical" legal systems from a legal family. There are three fundamental issues with the method of legal families: first, the distinction between the different legal families is orientated at only a few, very general criteria such as the different sources of law (judge made law vs. codified law). The method of legal families also is oriented often at the differences between legal systems from the point of view of private law and does not focus on public law aspects. Third, comparison under the auspices of the method of legal families is prone to circularity since the results of the comparison often seem to be a mere confirmation of the allocation of a legal system to a certain legal family. Hence, the method of legal families can, despite its popularity and its widespread use, not claim to be a real method of comparative law.

---

[749] An Introduction to Comparative Law (translated by Tony Weir) (Oxford 1977), 3nd ed. (Oxford 1998), 3 V = pp. 38-40; Jan-Hendrik Röver, Prinzipien, § 12 III = pp. 11 f.

[750] René David and Camille Jauffret Spinosi, Les grands systèmes de droit contaimporains, 8th ed. (Paris 1982), Nos. 16-24 = pp. 21-31.

Another method of defining the scope of comparison in terms of which legal system to choose is the **method of types** („*Typen-Methode*")[751] which was authored by Ulrich Drobnig. According to the method of types each legal system has to be included in a comparision from which the comparatist can expect stimulation for his particular issue.[752] The method of types also requires basing the comparison on fundamental approaches ("types") to particular issues.[753] Although the method of types partly overlaps with the principles method of comparative law (a principle as understood under the principles method is close to the concept of a legal type[754]) it shows two significant differences. First, the method of types proceeds deductively, i.e. starts from legal types which it then compares, whereas the principles methods develops legal principles inductively and only then compares the legal results. This seems to be more appropriate with a view to avoiding circular arguments. Second, the method of types is open with respect to its normative measure; in fact it does not even refer to the need of a normative measure explicitly. Clearly the method of types requires that legal systems have to be compared and criticised under this method, but it remains unclear what this means in practice. On the contrary, the principles method clearly refers to economic principles as the relevant measure (at least for the context of security law) and therefore offers – in the sense of the three dimensions of comparative law – a more comprehensive approach.

The main issue tackled by Rudolf Schlesinger's so-called **factual approach** (sometimes also referred to as the problem oriented method of comparative law)[755] is how to achieve

---

[751] Methodenfragen der Rechtsvergleichung im Lichte der „International Encyclopedia of Comparative Law in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds.), Ius Privatum Gentium. Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969 (Tübingen 1969), pp. 221-33; Jan-Hendrik Röver, Prinzipien, § 2 III = p. 12.

[752] Ulrich Drobnig, Methodenfragen der Rechtsvergleichung im Lichte der „International Encyclopedia of Comparative Law in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds.), Ius Privatum Gentium. Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969 (Tübingen 1969), p. 225.

[753] Methodenfragen der Rechtsvergleichung im Lichte der „International Encyclopedia of Comparative Law in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds.), Ius Privatum Gentium. Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969 (Tübingen 1969), p. 225.

[754] As was pointed out in chapter 4.

[755] See in particular Rudolf B. Schlesinger, Research on the General Principles of Law Recognized by Civilized Nations. Outline of a New Project in 1957 AJIL vol. 51, pp. 734-53; Rudolf B. Schlesinger, The Common Core of Legal Systems. An Emerging Subject of Comparative Study in Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard (eds.), XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema (Leiden 1961), pp. 65-79; Rudolf B. Schlesinger, Comparative Law. Cases - Texts - Materials, 4th ed. (New York 1980), pp. 37-41; Rudolf B. Schlesinger, Hans W. Baade, Mirjan Damaska and Peter E. Herzog, Comparative Law. Cases - Texts - Materials, 5th ed. (New York 1988), pp. 34-

comparability of different legal systems. The traditional approach of comparative law is to compare functionally equivalent legal concepts, i.e. the **functional approach.**[756] The functional approach suffers, in the author's opinion, from its strict link between legal concepts and comparison. This link forces the comparatist to compare larger groups of norms and prevents her to focus on individual issues.[757] Schlesinger's approach starts earlier than the functional approach since it requires the comparatist to begin the comparison with legal issues arising in the context of (hypothetical) cases. The principles method equally starts the comparison from legal issues, but it is different when it comes to the result of such comparison. Schlesinger's factual approach was prominently used in the context of a comparison of national contract laws[758] and the aim of this study was to find the "common core" of the rules on formation of contracts. This approach is in the author's opinion wrong since it already assumes from the beginning what it is supposed to prove after the comparison. It is no wonder that the "common core" approach works in particular in and is demonstrated at the example of contract law since this area of law features great similarities between legal systems.

Another approach to comparative law is represented by Ugo Mattei who is combining **comparative law and economics.**[759] Mattei uses economics as a tool to evaluate normatively legal approaches. This approach seems, however, to be limited in three ways. First, it equates economics with transaction cost analysis. This is in the author's opinion too narrow since e.g. macroeconomic factors are neglected.[760] It also appears that Mattei's approach is functional in the sense that it looks rather at how legal rules work in practice. On the contrary, the approach under the principles method is rules based. Although a functional approach is a useful additional tool in comparative law, it seems that the comparison has to start with the existing rules (be they written or non-written). The principles method does exactly that. Lastly, in the sense of the three dimensions of

---

9; Rudolf B. Schlesinger, The Past and Future of Comparative Law in 1995 ACJL vol. 43, pp. 477-81; Jan-Hendrik Röver, Prinzipien, § 6 III = pp. 94-6.

[756] Jan-Hendrik Röver, Prinzipien, § IV = pp. 14 f. with further references.

[757] Jan-Hendrik Röver, Prinzipien, § IV = pp. 14 f.

[758] Rudolf B. Schlesinger (ed.), Formation of Contracts. A Study of the Common Core of Legal Systems, 2 vols. (Dobbs Ferry/N.Y., London 1968).

[759] Comparative Law and Economics (Ann Arbor 1997).

[760] See for the broader approach of the principles method Jan-Hendrik Röver, Prinzipien, § 7 III-VII = pp. 105-28.

comparative law Mattei's approach only covers one dimension of comparative law and, therefore, does not provide a comprehensive framework for comparison.

Another group of comparative methods stipulates a certain result of the comparison. The author counts Schlesinger's factual approach, Josef Esser's principles theory[761] and Ernst Rabel's approach to this group of comparative methods. We have already dealt with Schlesinger's factual approach. In a similar sense Esser assumed that legal systems contain universal, not structurally linked, fundamental legal principles.[762] Equally Ernst Rabel referred in his writings to "general principles" and "common ideas".[763] These forms of **universalism** are particularly prominent examples of a universalist strand in comparative thinking which finds its contemporary examples in universal jurisprudence, the *lex mercatoria* school and the *ius commune* school.[764] Anne Peters and Heiner Schenke have traced back universalism even further and identified it in the legal epochs of the enlightenment, of historicism, intra- and transnational unification and lastly functionalism.[765] A fundamental assumption of universal principles has to be rejected in the context of comparative law since it leads to a "universalistic fallacy", i.e. a prejudice for universal principles where comparative law has not yet started its comparison. Contrary to Rabel's "general principles", Esser's "universal principles" or Schlesinger's "common core", legal principles are mere analytical tools under the principles method used in this study.

Critical comparative law, a section of the critical legal studies movement, is mainly criticising the traditional approach to comparative law but does not itself offer a rational approach to the comparison of legal systems.[766] In the author's view the arguments raised by critical comparative law against traditional comparative law are mainly self-

---

[761] Jan-Hendrik Röver, Prinzipien, § 6 I 3 = pp. 81-6.
[762] Josef Esser, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, 4th ed. (Tübingen 1990), p. 381.
[763] Ernst Rabel, International Tribunals for Private Matters in The Arbitration Journal 1948, pp. 209-212; Ernst Rabel, Aufgabe und Notwendigkeit der Rechtsvergleichung in Ernst Rabel, Gesammelte Aufsätze, vol. III: Arbeiten zur Rechtsvergleichung und zur Rechtsvereinheitlichung 1919-1954. Mit einem Verzeichnis der Schriften Ernst Rabels (edited by Hans G. Leser) (Tübingen 1967), pp. 1-21.
[764] Jan-Hendrik Röver, Prinzipien, § 6 I 3 = pp. 86 f.
[765] Anne Peters and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 803-10.
[766] See chapter 3.2 above.

contradictory and, although they raise some valid concerns against the activity of comparative law, cannot replace this approach as such.

1.3 Normative criteria of comparative law

The next tool for the ensuing comparison of this study and another element of the principles method of comparative law was identified in **normative criteria**. It was shown that the analytical principles of security law can be evaluated on the basis of the micro- and macroeconomic functions of security.[767] As the most important function the risk-reducing function of security was identified. Other microeconomic functions of security were the function to provide information about the debtor and the prevention of risk-shifting. In addition, the study pointed out the macroeconomic importance of security (which supports lending and investment in an economy and assists in the efficient allocation of resources in an economy). The study pointed out certain limitations of the discussion of secured transactions in the writings of economists. It was highlighted that economists often work with an undifferentiated and uncritical notion of security. Therefore, the detailed comparative analysis of security interests – as undertaken in this study – may have implications for the discussion of secured transactions in economics. At the example of Ugo Mattei's approach to comparative law and economics it was shown that economic arguments should not be limited to a transaction cost analysis as is done by Mattei.[768] The approach supported in this study was to rely on the full scope of macro- and microeconomic tools which are available.

2 Comparative principles of proprietary security

On the basis of the principles method of comparative law and the normative principles a number of functional principles of security law were described which showed the understanding of secured debt and charged property in several legal systems. This was an expansion of the work undertaken in an earlier study[769] which concentrated on the security principle, the principle of property right, the principles of security in own property and in

[767] Chapter 5.
[768] Who in this respect follows Richard Posner who pioneered economic analysis of law for American law.

property held by another person, the principles of form and functionality and, lastly, the principle of unity and multiplicity.[770] The study described legal concepts which were developed from specific legal issues and which were evaluated on the basis of normative criteria.

The present study – even more than the earlier study which was more concerned about developing a new method of comparative law and was focusing more on general issues – demonstrated that the principles method can lead to specific, practical results. The principles method of comparative law as tested in this study is not only a new technique which adds to the methods of comparative law. The results of the principles method can also be used for the practical work of reforming legal systems. The principles method detaches the view from specific legal systems (e.g. in security law often Article 9 UCC is used as a comprehensive model for law reform) and allows a true competition of legal concepts. It is not necessary any longer to adopt wholesale models from foreign countries (as was a popular approach for legal reform in central and eastern European countries). Legal reforms can concentrate on particular issues and be based on the experience gained in other legal systems. This may improve the approach to legal reform.

[769] Jan-Hendrik Röver, Prinzipien.
[770] For a summary see chapter 7.5.

Annex

Annex 1: Text of the Model Law on Secured Transactions prepared by the European Bank for Reconstruction and Development (1994)

Part 1. General Provisions

Article 1. Nature of a Charge

1.1 Things and rights may be encumbered by the owner with a security right (called a charge) in order to grant security for a debt.

1.2 This law does not prevent a security right arising

1.2.1 by operation of law or by judicial or administrative act; or

1.2.2 pursuant to *[specific exceptions to be determined separately for each jurisdiction]*.

Article 2. Person Giving a Charge

Any person may grant a charge over his things and rights except that a natural person may grant a charge only as part of his business activity and only over things and rights used for that activity at the time of creation of the charge pursuant to Article 6.7. The person granting the charge is called the chargor.

Article 3. Person Receiving a Charge

3.1 A charge may be granted to any person or persons to whom the debt or any of the debts being secured is owed. The person receiving the charge or to whom it is transferred is called the chargeholder.

3.2 The chargeholder may appoint another person (called a charge manager) to act in his place in relation to a charge pursuant to Article 16.

Article 4. Secured Debt

4.1 A charge may secure one or more debts (called a secured debt).

4.2 For the charge to be valid the secured debt must be capable of expression in money terms whether in national or foreign currency or monetary units of account or any combination of these. A charge securing an obligation which is not yet translated into a money obligation is not enforceable until this translation occurs.

4.3 A secured debt may be

4.3.1 owed by any person or persons who need not be the chargor;

4.3.2 identified specifically or generally;

4.3.3 governed by national or foreign law;

4.3.4 conditional or future.

4.4 A debt which is created after the date of the charging instrument will be included in the secured debt if that debt is identified in the charging instrument.

4.5 The amount of the debt secured by a charge is limited to the maximum shown on the registration statement pursuant to Article 8.4.3 or, in the case of a possessory charge, in the charging instrument pursuant to Article 7.3.3 plus any additional amounts included pursuant to Article 4.6.

4.6 The following additional amounts are included in the secured debt unless otherwise agreed between the chargor and the chargeholder

4.6.1 interest on the secured debt to the extent contractually payable from the time at which the charge is created or deemed to be created pursuant to Article 6.7 or 6.8 until the date of payment; and

4.6.2 interest on the secured debt payable by operation of law; and

4.6.3 reasonable costs properly incurred by the chargeholder in preserving and maintaining the charged property and in enforcing the charge; and

4.6.4 damages for any breach of the contract under which the secured debt arises up to twenty per cent.

4.6.4.1 of the maximum amount of the secured debt included in the registration statement pursuant to Article 8.4.3 or the charging instrument pursuant to Article 7.3.3; or

4.6.4.2 in the case of an unpaid vendor's charge, of the unpaid part of the purchase price referred to in Article 9.2.1.

Article 5. Charged Property

5.1 A charge may encumber one or more things or rights (called charged property).

5.2 Charged property may comprise anything capable of being owned, in the public sector or in the private sector, whether rights or movable or immovable things, and including debts due from the chargeholder to the chargor. The charged property includes any thing or right which, at the time of creation of the charge or subsequently, is attached or related to the charged property and which on a transfer of ownership of the charged property as described in the charging instrument would be included with the charged property by operation of law.

5.3 Things or rights which are not capable in law of being transferred separately cannot be charged separately.

5.4 A charge is valid notwithstanding any agreement entered into by the chargor not to charge things or rights except

5.4.1 where the charged property is a contractual obligation which is not a debt for money; or

5.4.2 as provided under Article 12.6.

An agreement that a contractual right which is not a debt for money is not transferable is deemed unless otherwise provided to be an agreement that the right cannot be charged.

5.5 Charged property may be identified specifically (in which case the charge is a specific charge) or generally (in which case

the charge is a class charge).

5.6 Where a class charge covers

5.6.1 all the things and rights used in an enterprise which is capable of operating as a going concern; or

5.6.2 such part of the things and rights of an enterprise as needs to be transferred to enable an acquirer to continue the enterprise as a going concern;

the charge may be registered as an enterprise charge pursuant to Article 8.4.5.

5.7 Charged property may be situated within or outside the jurisdiction.

5.8 A charge may be expressed to cover things and rights not owned by the chargor at the time at which the charge is deemed to be created pursuant to Article 6.8.

5.9 A charge extends to things and rights which become owned by the chargor after the charge is deemed to be created pursuant to Article 6.8 if they are identified in the charging instrument.

5.10 The charged property automatically extends to any rights of the chargor under any insurance policy which covers loss or reduction in value of the charged property.

Part 2. Creation of a Charge

Article 6. General Rules for the Creation of a Charge

6.1 A charge may be only

6.1.1 a registered charge; or

6.1.2 an unpaid vendor's charge; or

6.1.3 a possessory charge.

6.2 A registered charge is created by

6.2.1 the chargor and the chargeholder entering into a charging instrument pursuant to Article 7; and

6.2.2 registration of the charge pursuant to Article 8.

6.3 An unpaid vendor's charge is created pursuant to Article 9.1.

6.4 A possessory charge is created by

6.4.1 the chargor and the chargeholder entering into a charging instrument pursuant to Article 7; and

6.4.2 possession of the charged property being given pursuant to Article 10.1.

6.5 A charge is created only if

6.5.1 the chargor as referred to in Article 2 is the owner of the charged property; and

6.5.2 the chargor has the power to grant the charge at the time the charge is created or deemed to be created pursuant to Article 6.7 or 6.8; and

6.5.3 the charge secures a debt as referred to in Article 4.2.

6.6 An enterprise charge may only be created by a [company].

6.7 The time at which a charge over things or rights owned by the chargor is created is

6.7.1 in the case of a registered charge, the time of registration of the charge pursuant to Article 34.4 unless the charge was initially created as an unpaid vendor's charge or a possessory charge in which case it is the time of initial creation in accordance with Article 6.7.2 or 6.7.3;

6.7.2 in the case of an unpaid vendor's charge, the time at which title to the charged property is transferred to the purchaser pursuant to Article 9.1;

6.7.3 in the case of a possessory charge, the later of possession of the charged property being given pursuant to Article 10.1 and the date of signature of the charging instrument by or on behalf of the chargor.

6.8 Where a registered charge is granted over things or rights not yet owned by the chargor the charge is deemed to have been created at the time provided under Article 6.7.1.

6.9 An unpaid vendor's charge or a possessory charge is converted into a registered charge upon registration in accordance with Article 8.2.

6.10 A chargor and a chargeholder may agree to add to the debt secured by a charge, to increase the maximum amount of the secured debt pursuant to Article 4.5, to add to the charged property or to convert a charge as described in Article 5.6 into an enterprise charge. Such addition, increase or conversion is treated as the creation of a new charge and is accordingly subject to all the provisions of this law.

Article 7. Charging Instrument

7.1 The chargor and the chargeholder must enter into an agreement (called a charging instrument) except in the case of an unpaid vendor's charge. One charging instrument may relate to one or more charges.

7.2 The charging instrument may be in the form set out inschedule 1.

7.3 In order to be valid the charging instrument must be in writing and include

7.3.1 identification of the chargor, the person owing the secured debt (if not the chargor) and the chargeholder; and

7.3.2 specific or general identification of the secured debt; and

7.3.3 in the case of a possessory charge, the maximum amount of the secured debt expressed in national or foreign currency or monetary units of account or any combination of these; and

7.3.4 specific or general identification of the charged property; and

7.3.5 signatures by or on behalf of

7.3.5.1 the chargor; and

7.3.5.2 the chargeholder; and

7.3.6 the date of the charging instrument being the date of signature by or on behalf of the chargor.

7.4 A charge is not valid unless the charging instrument contains a statement that the purpose of the document is to create a charge or such purpose is implied from the instrument.

7.5 The charging instrument may include such other matters as the parties agree and may, subject to Article 6.10, subsequently be amended by the parties. In order for an amendment to be of effect against third parties it must be registered pursuant to Article 33.1.1.

7.6 If a charging instrument is signed by a person acting on behalf of the chargor the charge is valid only if that person is independent of the chargeholder.

Article 8. Registered Charge

8.1 In order to obtain registration of a registered charge as referred to in Article 6.2 a registration statement must be presented at the charges' registry not later than 30 days after the date of the charging instrument as defined in Article 7.3.6. If a registration statement is not presented by that date the charge is not created.

8.2 In order to convert an unpaid vendor's charge or a possessory charge into a registered charge a registration statement must be presented at the charges' registry during the time provided in Article 9.3 or Article 10.2.

8.3 The registration statement may be in the form set out in schedule 2.

8.4 In order for a registered charge to be valid the registration statement must include

8.4.1 identification of the chargor, the person owing the secured debt (if not the chargor), the chargeholder and the charge manager (if appointed); and

8.4.2 specific or general identification of the secured debt; and

8.4.3 the maximum amount of the secured debt expressed in national or foreign currency or monetary units of account or any combination of these; and

8.4.4 specific or general identification of the charged property; and

8.4.5 in the case of an enterprise charge, a statement that the charge is an enterprise charge; and

8.4.6 signature by or on behalf of

8.4.6.1 the chargor and the charge manager (if appointed); or

8.4.6.2 in the case of a registration statement pursuant to Article 8.2, the chargeholder; and

8.4.7 the date of the charging instrument except where an unpaid vendor's charge is converted into a registered charge; and

8.4.8 any additional information required pursuant to Article 8.5 or 8.6.

8.5 Where an unpaid vendor's charge is being converted into a registered charge the registration statement must in addition to

the information required under Article 8.4 include

8.5.1 a statement that the unpaid vendor's charge is being converted into a registered charge; and

8.5.2 the date on which title to the charged property was transferred to the chargeholder as referred to in Article 9.1; and

8.5.3 the date and identification of the written agreement referred to in Article 9.1.

8.6 Where a possessory charge is being converted into a registered charge the registration statement must in addition to the information required under Article 8.4 include

8.6.1 a statement that the possessory charge is being converted into a registered charge; and

8.6.2 the date on which possession of the charged property was given pursuant to Article 10.1 if given after the date of the charging instrument.

8.7 Where there is more than one chargor a separate registration statement must be presented for each chargor.

8.8 If a registration statement is signed by a person acting on behalf of the chargor the charge is valid only if that person is independent of the chargeholder.

8.9 The time of registration is as provided in Article 34.4.

Article 9. Unpaid Vendor's Charge

9.1 Where at or before the time of transfer of title by way of sale of a movable thing there is written agreement between the vendor and the purchaser that the vendor retains title or obtains a security right in the thing until payment of the purchase price

9.1.1 title to the thing is not retained by the vendor but is transferred to the purchaser as if such agreement does not exist; and

9.1.2 the vendor simultaneously receives a charge over the thing unless the parties otherwise agree without any requirement for a charging instrument or registration.

9.2 A charge created pursuant to Article 9.1 only secures

9.2.1 any part of the purchase price of the charged property that remains unpaid at the time the charge is created; and

9.2.2 additional amounts included pursuant to Article 4.6.

9.3 At any time within six months of the date on which an unpaid vendor's charge is created it may be converted into a registered charge by registration in accordance with Article 8.2.

9.4 An unpaid vendor's charge terminates

9.4.1 six months after the date on which it was created unless an enforcement notice has been delivered pursuant to Article 22.2 in respect of the charge or any other charge over the same charged property; or

9.4.2 in the other events provided under Article 32.

Article 10. Possessory Charge

10.1 Where the charged property is capable of transfer by delivery the chargeholder or a person nominated by the chargeholder or a person holding on terms agreed between the chargeholder and the chargor may before or after the date of the charging instrument be given possession of the charged property by the chargor in which case registration pursuant to Article 8 is not required.

10.2 At any time while possession as referred to in Article 10.1 continues a possessory charge may be converted into a registered charge by registration in accordance with Article 8.2.

Article 11. Additional Registration

11.1 Where additional registration of a charge is required pursuant to this Article 11 a charge created pursuant to Article 6 cannot be enforced until such registration has been made.

11.2 [Add specific requirements for additional registration to be determined separately for each jurisdiction.]

Article 12. Charge of a Debt

12.1 Where the charged property is a debt for money the person owing the charged debt may satisfy it in a manner agreed with the chargor unless the chargeholder notifies that person pursuant to Article 12.2.

12.2 The chargeholder may at any time notify the person owing the charged debt that the charge exists. In that event

12.2.1 the charged debt can be satisfied only by payment to the chargeholder or to such person as the chargeholder nominates unless the chargeholder otherwise agrees; and

12.2.2 the chargeholder may directly pursue the person owing the charged debt for that debt.

12.3 For a notice given pursuant to Article 12.2 to be valid it must

12.3.1 be in writing; and

12.3.2 identify the chargor; and

12.3.3 describe the charged debt either specifically or generally in a manner which enables the person owing the charged debt to identify it; and

12.3.4 include clear instructions as to the person to whom the charged debt is to be paid.

12.4 The instructions given pursuant to Article 12.3.4 may be amended by a subsequent notice in accordance with Article 12.3.

12.5 Upon a charged debt being satisfied the charge terminates pursuant to Article 32.1.3.

12.6 Where the charged property is a secured debt the charge over the secured debt extends to the charge given in respect of that debt unless otherwise provided in the charging instrument for either charge. Where the charged property is described as the charge given in respect of a secured debt it is deemed to include that debt.

Article 13. Charge of a Contractual Obligation other than a Debt

Where the charged property is a contractual obligation which is not a debt for money the person owing the contractual obligation may satisfy it in the manner agreed with the chargor unless

13.1 the person owing the contractual obligation has received notice from the chargeholder pursuant to Article 23.3; and

13.2 the chargeholder exercises the chargor's rights pursuant to Article 23.3.3.

Article 14. Rights and Defences

14.1 A chargeholder may only claim rights arising out of a charge if the charge has been created pursuant to Article 6 and has not been terminated pursuant to Article 32.

14.2 A chargeholder may only claim rights arising out of a charge in relation to a debt if the charge extends to that debt.

14.3 A chargeholder may only claim rights arising out of a charge in relation to charged property if the charge extends to that property.

14.4 A charge is valid and enforceable only to the extent that the secured debt is valid and enforceable.

14.5 In any proceedings brought by the chargeholder claiming rights arising out of the charge

14.5.1 the chargeholder must prove that the charge has been created; and

14.5.2 the chargor or other party must prove that the charge has terminated or that any defences which he claims apply.

14.6 A chargor, any other chargeholder with a charge over the same charged property or any other party claiming rights in the charged property who disputes the creation or validity of the charge or claims that a charge has been terminated may apply to the court for a declaration that the charge is not created, is invalid or has been terminated.

Article 15. Rights and Obligations of Chargor and Chargeholder

15.1 The chargor and the chargeholder are free to determine the rights and obligations of each of them except as otherwise provided by law.

15.2 The chargor is under an obligation not to deal in the charged property except under a licence pursuant to Article 19 or Article 20 and is liable to the chargeholder for any loss suffered as a result of breach of this obligation.

15.3 The chargor has, except in the case of a possessory charge and unless otherwise agreed, the right

15.3.1 to make use of or apply the charged property including to combine the charged property with any other thing or right, to apply the charged property in any manufacturing process and, where the charged property has been acquired for consumption, to consume the charged property; and

15.3.2 to receive any fruits arising out of the charged property.

Rights arising pursuant to this Article 15.3 terminate upon an enforcement notice being delivered pursuant to Article 22.2.

15.4 The chargor and the chargeholder have unless they otherwise agree the following further rights and obligations

15.4.1 except in the case of a possessory charge, the chargor must preserve and maintain the charged property subject to his right to use it pursuant to Article 15.3.1. Where possession of the charged property is passed to a third party the chargor remains under an obligation to ensure that the charged property is preserved and maintained; and

15.4.2 in the case of a possessory charge, the chargeholder must preserve and maintain the charged property; and

15.4.3 the party not in possession of the charged property has a right to inspect; and

15.4.4 the chargor must insure the charged property against such risks as are habitually insured against by a prudent person owning similar things or rights.

Article 16. Charge Manager

16.1 The chargeholder may at any time appoint a charge manager for a registered charge either in the charging instrument or in a separate document.

16.2 The charge manager may be a chargeholder or a third party. Where a charge is granted to more than one chargeholder the appointment of the charge manager and any termination of that appointment must in order to be valid be made by or on behalf of all the chargeholders.

16.3 The powers and obligations of the charge manager are as provided in this Article 16 and any agreement relating to those powers and obligations is of effect only between the parties to that agreement.

16.4 Immediately upon a charge manager being registered pursuant to Article 8.4.1 or 33.1.2

16.4.1 the charge manager becomes entitled to exercise in the place of the chargeholder all the rights of the chargeholder arising under the charge including but not limited to the right to take enforcement proceedings pursuant to Articles 22 to 25 but excluding any right to transfer the secured debt;

16.4.2 the chargeholder ceases to be entitled to exercise such rights while the charge manager is appointed;

16.4.3 the charge manager becomes liable to perform all the obligations of the chargeholder to third parties arising out of the charge notwithstanding the continuing liability of the chargeholder.

16.5 When a person is registered as a charge manager pursuant to Article 8.4.1 or 33.1.2, any act of that person as charge manager is binding on the chargeholder even if the appointment of the charge manager is invalid except where the person claiming against the chargeholder has actual knowledge at the time of the act of the invalidity of the appointment.

16.6 The appointment of a charge manager can be terminated by the chargeholder or the charge manager at any time subject to any agreement between them. The termination becomes effective against a third party at the time when he has actual knowledge of the termination or, if he does not have such knowledge, at the time when the termination is registered pursuant to Article 33.1.3.

16.7 Upon any transfer by a chargeholder of the secured debt extending to the charge the powers and obligations of a charge manager pursuant to this Article 16 continue and the charge manager acts in the place of the new chargeholder.

Part 3. Involvement of Third Parties

Article 17. Priorities between Chargeholders

17.1 A chargor may grant more than one charge over the same right or thing.

17.2 The priority between different charges over the same charged property is determined in accordance with the time at which they were created or deemed to be created pursuant to Articles 6.7 or 6.8 except as otherwise provided in this Article 17. Where title to a thing or right is acquired subject to a charge that charge will have priority over any charge granted by the acquirer.

17.3 An unpaid vendor's charge takes priority over any other charge granted by the purchaser over the thing transferred.

17.4 A possessory charge over negotiable instruments or negotiable documents takes priority over any prior charge.

17.5 The priority of a charge over a thing or right to which additional registration under Article 11 applies is determined by the later of the time of its creation or deemed creation pursuant to Articles 6.7 or 6.8 and the time at which such additional registration is made.

17.6 A security right arising by operation of law for money due for services in relation to a thing or right held takes priority over any prior charge.

17.7 [Specific exceptions to be determined separately for each jurisdiction to cover charges under other laws].

17.8 The priority of a charge may be changed at any time by written agreement between chargeholders or between the chargor and a chargeholder. An agreement to change the priority of a charge is valid only upon written consent being obtained from

17.8.1 the chargeholder of any other charge which would cease to have priority over that charge as a result of the change; and

17.8.2 the chargeholder of any other charge which as a result of the change

17.8.2.1 would cease to have the same priority as that charge; and

17.8.2.2 would not acquire priority over that charge.

Article 18. Transfer of a Secured Debt

18.1 A transfer of a secured debt by the chargeholder extends to the charge given in respect of that debt unless otherwise provided in the charging instrument or agreed between the parties to the transfer. An agreement which provides for the transfer of a charge is deemed to be a transfer of the debt secured by that charge. The charge terminates pursuant to Article 32.1.9 if the secured debt is transferred without the charge.

18.2 In the case of a transfer of a debt secured by a possessory charge, the transfer extends to the charge only if at the time of the transfer

18.2.1 the transferor passes possession of the charged property to the new chargeholder or a person nominated by the new chargeholder; or

18.2.2 the transferor agrees to hold the charged property on behalf of the new chargeholder.

18.3 Where a secured debt which extends to a registered charge has been transferred the charge is not enforceable unless

18.3.1 the transfer is registered pursuant to Article 33.1.4; or

18.3.2 a charge manager is registered in respect of the charge pursuant to Article 8.4.1 or 33.1.2.

18.4 The chargor may claim any defences which he has against the transferor also against the new chargeholder.

18.5 A transfer of a secured debt which extends to the charge automatically extends also to all rights of the chargeholder under the charging instrument unless otherwise provided in the charging instrument or agreed between the parties to the transfer.

18.6 Where only part of a secured debt and a charge is transferred the new chargeholder becomes entitled to the charge and any transferred rights under the charging instrument jointly with the transferring chargeholder up to the amount of the secured debt transferred.

18.7 A transfer of a secured debt by operation of law extends to the charge given in respect of that debt.

Article 19. Legal Licence to Transfer Charged Property

19.1 The chargor has a licence to transfer title to the charged property by way of sale free from the charge in the terms set out in this Article 19 except in the case of a possessory charge.

19.2 The chargor may transfer title to items of his charged trading stock by way of sale in the ordinary course of his trading activity.

19.3 The chargor may transfer title to other charged property by way of sale in the ordinary course of his business provided that the thing or right transferred is of a kind that is habitually transferred by him in the ordinary course of his business.

19.4 In the case of an enterprise charge the chargor may transfer title by way of sale in any charged property in respect of which applicable additional registration as provided in Article 11 has not been made.

19.5 The licence to transfer title by way of sale pursuant to this Article 19 is suspended automatically

19.5.1 upon possession of the charged property being given pursuant to Article 10.1 until the time when such possession ceases; or

19.5.2 upon an enforcement notice in respect of the charge being delivered pursuant to Article 22.2 until enforcement proceedings may no longer be continued pursuant to Article 22.4.

19.6 Any agreement between the chargor and the chargeholder restricting or terminating the licence pursuant to this Article 19 is of effect only between the parties.

Article 20. Contractual Licence to Deal in Charged Property

20.1 The chargeholder may, except in the case of a possessory charge, grant the chargor a contractual licence to transfer title to the charged property free from the charge in addition to the licence granted pursuant to Article 19.

20.2 In any contractual licence granted pursuant to Article 20.1 the charged property may be identified specifically or generally and the licence may be granted on such terms as the chargor and chargeholder may agree.

20.3 The grant of a contractual licence pursuant to Article 20.1 may be included in the charging instrument and in that event a person dealing with the chargor acquires charged property free from the charge pursuant to Article 21.2.3 without being under an obligation to make further enquiries.

20.4 A contractual licence granted pursuant to Article 20.1 is suspended automatically in the events as provided in Article 19.5 and may subject to Article 20.3 be terminated at any time by the chargeholder or in accordance with its terms.

Article 21. Third Party Acquiring Charged Property

21.1 Any person acquiring title to charged property will acquire subject to the charge except as provided in Article 21.2.

21.2 If a person acquires title to charged property he acquires it free from the charge

21.2.1 where the chargor transfers title to the charged property by way of sale under the licence granted pursuant to Article 19; or

21.2.2 while the licence granted pursuant to Article 19 is suspended where the transfer of title by the chargor by way of sale if made prior to suspension would have been under the licence and where either

21.2.2.1 the purchaser does not have actual knowledge at the time of the transfer of the existence of the charge; or

21.2.2.2 the purchaser believes in good faith at the time of the transfer that the licence exists; or

21.2.3 where the chargor transfers title to the charged property under a contractual licence granted pursuant to Article 20.1; or

21.2.4 while a contractual licence granted pursuant to Article 20.1 is suspended or after it is terminated where the transfer of title by the chargor if made prior to suspension or termination would have been under the licence and where the acquirer believes in good faith at the time of the transfer that the licence exists. Except where a contractual licence is contained in the charging instrument the acquirer is under an obligation to enquire of the chargeholder; or

21.2.5 where the price paid for the charged property is less than [amount] and where the purchaser believes in good faith at the time of the transfer that no charge exists; or

21.2.6 where the charged property is

21.2.6.1 a negotiable instrument or negotiable document; or

21.2.6.2 a share or debt instrument or a contract quoted on a recognised exchange or habitually traded in a recognised market; or

21.2.7 where the charge is to an unpaid vendor pursuant to Article 9 unless

21.2.7.1 a purpose of the chargor is to terminate the unpaid vendor's charge; and

21.2.7.2 the acquirer has actual knowledge at the time of the transfer of that purpose or circumstances exist which should make him aware of that purpose.

21.3 For the purposes of Articles 21.2.2.2 and 21.2.4 a purchaser or an acquirer believes in good faith that a licence exists if

21.3.1 he does not have actual knowledge of the termination of the licence; and

21.3.2 there do not exist circumstances which should make him aware of the termination of the licence.

21.4 For the purposes of Article 21.2.5 a purchaser believes in good faith that no charge exists if

21.4.1 he does not have actual knowledge of the existence of the charge; and

21.4.2 there do not exist circumstances which should make him aware of the existence of the charge.

21.5 For the purposes of Articles 21.2.2, 21.2.4 and 21.2.5 the purchaser or acquirer is not under an obligation to search the charges' register unless the particular circumstances are abnormal and such as to make a search of the charges' register prudent.

21.6 Where a person acquires title to charged property subject to a registered charge the chargeholder may at any time register the charge against the name of such person pursuant to Article 33.1.5.

Part 4. Enforcement and Termination

Article 22. General Rules on Enforcement

22.1 A charge becomes immediately enforceable if there is a failure to pay the secured debt and it remains immediately enforceable until

22.1.1 the chargeholder agrees that the charge is no longer immediately enforceable; or

22.1.2 the secured debt is satisfied in full or otherwise ceases to exist; or

22.1.3 the charge terminates for any other reason.

22.2 The chargeholder of a charge which has become immediately enforceable may commence enforcement proceedings by delivering an enforcement notice to the chargor containing the information set out in Article 22.7.

22.3 When a chargeholder has delivered an enforcement notice pursuant to Article 22.2 he has the right to take protective measures pursuant to Article 23 and to realise the charge pursuant to Article 24 or, in the case of an enterprise charge, to have the charge enforced pursuant to Article 25.

22.4 Enforcement proceedings cannot be continued if

22.4.1 a supplementary registration statement in respect of the enforcement notice delivered pursuant to Article 22.2 has not been presented at the charges' registry pursuant to Article 33.1.6 within seven days of delivery to the chargor; or

22.4.2 the enforcement notice is declared invalid by the court; or

22.4.3 the charge ceases to be immediately enforceable in accordance with Article 22.1.

22.5 In the event of the chargeholder failing to register the enforcement notice as required by Article 22.4.1 the chargeholder is liable to the chargor, any other chargeholder with a charge over the same property and any other party claiming rights in the charged property for any loss suffered by any of them as a result of the protective measures. This does not apply where the charge ceases to be immediately enforceable in accordance with Article 22.1 within seven days of delivery of the enforcement notice to the chargor and where the protective measures were taken while the charge was immediately enforceable.

22.6 The chargeholder may at any time request deregistration of the enforcement notice pursuant to Article 33.1.11 and is under an obligation to do so in the events referred to in Article 22.4.2 and 22.4.3.

22.7 An enforcement notice delivered pursuant to Article 22.2 must in order to be valid be in writing and

22.7.1 identify the charge in respect of which enforcement proceedings are being commenced

22.7.1.1 in the case of a registered charge, by reference to the charges' register and the date of registration; or

22.7.1.2 in the case of an unpaid vendor's charge or a possessory charge, by reference to the information required to register such a charge pursuant to Articles 8.4 to 8.6; and

22.7.2 identify the debt in respect of which enforcement proceedings are being commenced which may be the secured debt or any part of that debt; and

22.7.3 contain a statement that the charge has become immediately enforceable; and

22.7.4 where the chargeholder elects for a charged enterprise to be transferred as a going concern pursuant to Article 25.3 state that such election is being made and identify the person appointed as enterprise administrator; and

22.7.5 be signed by or on behalf of the chargeholder and, where Article 22.7.4 applies, the enterprise administrator; and

22.7.6 in the case of an enterprise charge, be signed by or on behalf of the chargeholder of any prior ranking enterprise charge.

Article 23. Measures for Protection of Charged Property

23.1 When an enforcement notice has been delivered pursuant to Article 22.2 the chargeholder has the right to possession of charged property which is in the form of movable things.

23.2 Where taking possession of charged property referred to in Article 23.1 is impracticable or is disputed by a third party in possession of the charged property the chargeholder may take such steps as are necessary to immobilise the charged property, to prevent the chargor or a third party using it and to prevent the chargor transferring title to it.

23.3 Where an enforcement notice has been delivered pursuant to Article 22.2 in respect of charged property which is a contractual obligation other than a debt for money the chargeholder may notify the person owing the charged obligation that it is subject to a charge and that enforcement proceedings have been commenced. Upon such notification

23.3.1 the chargor cannot modify the contractual obligation without the agreement of the chargeholder; and

23.3.2 the chargor cannot take any steps to exercise his rights in respect of the contractual obligation without the agreement of the chargeholder; and

23.3.3 the chargeholder may exercise the chargor's rights in respect of the contractual obligation but in such case the chargeholder must comply with any corresponding obligation owed by the chargor.

23.4 Where an enforcement notice has been delivered pursuant to Article 22.2 the chargeholder may take reasonable steps

23.4.1 to preserve, maintain and insure the charged property; and

23.4.2 with a view to increasing the sale price or reducing the sale costs including enhancing the charged property or renting it on commercially prudent terms to a third party.

23.5 Upon application by the chargeholder the court may make an order for other appropriate measures to protect the charged property after the enforcement notice has been registered as required by Article 22.4.1.

23.6 The chargeholder at any time may take protective measures as agreed with the chargor.

23.7 If in order to obtain possession as referred to in Article 23.1 or to take other steps as provided in Article 23.2 the chargeholder does not have the right to enter upon the site where the charged property is situated or where any such rights are refused to the chargeholder he may appoint a [bailiff] for such purpose. The [bailiff] may on the chargeholder's behalf take the protective measures to which the chargeholder is entitled provided

23.7.1 he is satisfied that the charge is registered or, in the case of an unpaid vendor's charge or a possessory charge, the enforcement notice is registered; and

23.7.2 he receives from the chargeholder a copy of the enforcement notice delivered pursuant to Article 22.2.

Article 24. Measures for Realisation of Charged Property

24.1 When at least 60 days have elapsed since delivery of an enforcement notice pursuant to Article 22.2 the chargeholder has the right to transfer title to the charged property by way of sale in order to have the proceeds of sale applied towards satisfaction of the secured debt.

24.2 Any agreement entered into prior to delivery of an enforcement notice pursuant to Article 22.2 which provides for the transfer of title to charged property by way of sale by or to the chargeholder after delivery of the enforcement notice is invalid.

24.3 The chargeholder must

24.3.1 endeavour to realise a fair price for the charged property; and

24.3.2 advise the purchaser that he is transferring title to charged property in the capacity of chargeholder and that the proceeds of sale must be paid directly to a proceeds depositary appointed pursuant to Article 27.1.

24.4 The chargeholder may subject to the obligation under Article 24.3.1 transfer title to the charged property by way of sale in such manner as he considers appropriate which may include transfer by private agreement on the open market or at public or private auction. The chargeholder may appoint a person to act on his behalf for the transfer or for any matter connected with it.

24.5 A chargeholder is treated as having fulfilled his obligation under Article 24.3.1 if he can demonstrate that

24.5.1 in the case of charged property of a kind for which there is a recognised market, he acted in the manner of a prudent person operating in that market; or

24.5.2 in all other cases, he took such steps to realise a fair price as could be expected in the circumstances of a prudent person.

Article 25. Enterprise Charge Administration

25.1 An enterprise charge may be enforced pursuant to Articles 23 and 24 or pursuant to this Article 25.

25.2 Any agreement entered into prior to delivery of an enforcement notice pursuant to Article 22.2 which provides for the transfer of title to the charged enterprise by way of sale by or to the chargeholder after delivery of the enforcement notice is invalid.

25.3 A chargeholder of an enterprise charge who delivers an enforcement notice pursuant to Article 22.2 may elect for the

enterprise to be transferred as a going concern pursuant to this Article 25 and in that case the enforcement notice must comply with the requirements of Articles 22.7.4, 22.7.5 and 22.7.6.

25.4 A chargeholder may only make an election under Article 25.3 if he believes that the enterprise is capable of being transferred as a going concern.

25.5 When an election is made pursuant to Article 25.3

25.5.1 the chargeholder must appoint a person (called an enterprise administrator) who has the powers and obligations set out in this Article 25; and

25.5.2 the chargeholder may not, except as provided under Article 25.20, exercise any rights pursuant to Articles 23 and 24 unless the election is rescinded.

25.6 In order for the appointment of the enterprise administrator to be valid

25.6.1 he must be a [qualified accountant or lawyer]; and

25.6.2 he must not be a chargeholder or the charge manager; and

25.6.3 a statement of his appointment must be presented at the [registry where the chargor is registered] within seven days of delivery of the enforcement notice pursuant to Article 22.2.

25.7 Where an election is made pursuant to Article 25.3

25.7.1 the powers of the persons authorised by law or by the chargor's constitution to administer the enterprise and to deal in the charged property cease upon delivery of the enforcement notice; and

25.7.2 such powers are immediately vested in the enterprise administrator.

25.8 Each of the persons whose powers cease pursuant to Article 25.7.1 is under an obligation to give all necessary information and assistance to the enterprise administrator to enable him to manage the enterprise and to carry out his functions and may in addition be given such powers in relation to the enterprise as may be agreed with the enterprise administrator.

25.9 Each of the persons whose powers cease pursuant to Article 25.7.1 is liable for any loss suffered by the chargor or any third party as a result of any exercise by that person of any of his former powers after he has actual knowledge that his powers have ceased.

25.10 The enterprise administrator must

25.10.1 fulfil all those obligations that are provided by law for the persons whose powers are vested in him pursuant to Article 25.7.2 (but not including the obligation under Article 15.2); and

25.10.2 continue the enterprise as a going concern; and

25.10.3 advise the chargeholder promptly if he believes that the enterprise is not capable of being transferred as a going concern; and

25.10.4 endeavour to transfer the enterprise as a going concern and to realise a fair price; and

25.10.5 advise the purchaser that he is transferring title to charged property in the capacity of enterprise administrator and that the proceeds of sale must be paid directly to a proceeds depositary appointed pursuant to Article 27.1.

25.11 The appointment of an enterprise administrator terminates upon

25.11.1 his death; or

25.11.2 his becoming incapable of performing his obligations; or

25.11.3 his resignation; or

25.11.4 his being removed by the chargeholder; or

25.11.5 his being removed by the court; or

25.11.6 the transfer of the enterprise by way of sale; or

25.11.7 the administration of the enterprise ceasing pursuant to Article 25.22 or 25.23.

25.12 When the appointment of an enterprise administrator is terminated pursuant to Articles 25.11.1 to 25.11.5 a new enterprise administrator must be appointed

25.12.1 in the case of Articles 25.11.1, 25.11.2 or 25.11.3, by the chargeholder within seven days of the occurrence of the death, incapacity or resignation;

25.12.2 in the case of Article 25.11.4, by the chargeholder at the time of the removal of the previous enterprise administrator;

25.12.3 in the case of Article 25.11.5, by the court at the time of his removal and in such case the court may, if appropriate, appoint a new enterprise administrator nominated by the chargeholder.

25.13 If the chargeholder fails to appoint a new enterprise administrator

25.13.1 within seven days as provided in Article 25.12.1 the court may appoint a new enterprise administrator or rescind the election to have the enterprise transferred as a going concern pursuant to Article 25.3;

25.13.2 at the time of the removal by him of the previous enterprise administrator as referred to in Article 25.11.4 the removal is not valid.

25.14 The appointment of a new enterprise administrator after the seven days as provided in Article 25.12.1 is valid but the chargeholder is liable to the chargor, any other chargeholder with a charge over the same charged property and any other party claiming rights in the charged property for any loss suffered by reason of any delay in the appointment caused by the chargeholder.

25.15 The chargeholder is under an obligation to present at the charges' registry pursuant to Article 33.1.7 or 33.1.8 and at [the registry where the chargor is registered] a request for registration of any termination of the appointment of an enterprise administrator or any appointment of a new enterprise administrator within seven days of the termination or appointment.

25.16 Within 60 days of delivery of an enforcement notice pursuant to Article 22.2 the enterprise administrator may renounce any contract to which the chargor is party and which imposes continuing obligations on the chargor.

25.17 Where a contract imposes continuing obligations on the chargor the other party may serve a notice on the enterprise administrator at any time within the 60 day period requiring the enterprise administrator to state whether or not he will be exercising his right under Article 25.16. Until the enterprise administrator replies to that notice the obligation of the other party to perform is suspended.

25.18 When at least 60 days have elapsed since delivery of an enforcement notice pursuant to Article 22.2 the enterprise administrator has the right to transfer the enterprise by way of sale in order to have the proceeds of sale applied towards

satisfaction of the secured debt.

25.19 The enterprise administrator may subject to the obligation under Article 25.10.4 transfer the enterprise as a going concern by way of sale in such a manner as he considers appropriate which may include transfer by private agreement, on the open market or at public or private auction. The enterprise administrator may appoint a person to act on his behalf for the transfer or for any matter connected with it.

25.20 If the enterprise administrator determines that any part of the charged property can be transferred separately from the enterprise without preventing the transfer of the enterprise as a going concern he may agree with the chargeholder that such property is transferred by the chargeholder pursuant to Article 24.

25.21 An enterprise administrator is treated as having fulfilled his obligation under Article 25.10.4 if he can demonstrate that he took such steps as could be expected in the circumstances of a prudent person transferring an enterprise of that nature.

25.22 The election to have the enterprise transferred as a going concern pursuant to Article 25.3 must be rescinded by the chargeholder if he determines that the enterprise is no longer capable of being transferred as a going concern.

25.23 The election to have the enterprise transferred as a going concern pursuant to Article 25.3 may be rescinded

25.23.1 by the chargeholder if he determines that to do so is in the interests of other creditors of the chargor; or

25.23.2 by the court pursuant to Article 25.13.1 or 29.

25.24 In the event of the election being rescinded pursuant to Article 25.22 or 25.23 the charge may be enforced pursuant to Articles 23 and 24.

Article 26. Purchaser from Chargeholder or Enterprise Administrator

26.1 If a person acquires title to charged property from the chargeholder pursuant to Article 24 or from the enterprise administrator pursuant to Article 25 he acquires it free from any charge if

26.1.1 the enforcement notice and, in the case of a transfer pursuant to Article 25, the enterprise administrator remain registered on the charges' register until at least the third day (excluding weekends and public holidays) before the date of the transfer and no interim order remains registered pursuant to Article 33.1.9 at such time; and

26.1.2 the sale price is paid to a proceeds depositary appointed by the chargeholder pursuant to Article 27.

26.2 A purchaser will not acquire title free from any charge if he has actual knowledge at the time of the purchase that

26.2.1 the charge being enforced is not created, invalid or unenforceable; or

26.2.2 the charge has ceased to be immediately enforceable in accordance with Article 22.1; or

26.2.3 the enforcement notice has been declared invalid by a court; or

26.2.4 an order made by the court pursuant to Article 29.3 is still outstanding; or

26.2.5 in the case of transfer of an enterprise pursuant to Article 25, the election made pursuant to Article 25.3 has been rescinded.

26.3 The purchaser has no obligation to enquire as to the creation, validity and enforceability of the charge or as to the powers of the enterprise administrator registered on the charges' register.

Article 27. Proceeds Depositary

27.1 Prior to the day on which any proceeds of sale under Articles 24 or 25 become payable the chargeholder must appoint a person to receive the proceeds of sale (called a proceeds depositary). Such appointment may be made at any time after delivery of an enforcement notice pursuant to Article 22.2.

27.2 In order for the appointment of the proceeds depositary to be valid

27.2.1 he must be a [qualified accountant or recognised bank]; and

27.2.2 he cannot be the chargor, a chargeholder, the charge manager or the enterprise administrator.

27.3 The chargeholder or the enterprise administrator must cause the proceeds of sale to be paid to the proceeds depositary.

27.4 The proceeds depositary must place all amounts received by him on deposit on commercial terms with a prime bank in a segregated account.

27.5 Promptly after his appointment the proceeds depositary must establish a list setting out

27.5.1 the persons entitled to the proceeds of sale; and

27.5.2 the amount of the entitlement of each; and

27.5.3 the priority of the entitlement of each.

27.6 In order to establish the list pursuant to Article 27.5 the proceeds depositary

27.6.1 must examine the charges' register; and

27.6.2 must enquire of the chargor and the enterprise administrator; and

27.6.3 where the charged property includes a movable thing which may be subject to an unpaid vendor's charge, must determine the date of acquisition and, if appropriate, enquire of the vendor; and

27.6.4 must take note of any claim directly addressed to him; and

27.6.5 may but is not obliged to make other appropriate enquiries.

27.7 The proceeds depositary may exclude from the list any person who fails to provide information necessary to establish the list referred to in Article 27.5 if

27.7.1 the proceeds depositary has delivered two notices to that person requesting information as to his entitlement; and

27.7.2 there are at least 15 days between delivery of the first and of the second notice; and

27.7.3 both notices state that the information is needed for establishing the list and that any failure to provide the required information may cause loss of entitlement to proceeds of sale held by the proceeds depositary; and

27.7.4 the required information has not been received within 15 days of delivery of the second notice.

27.8 When the list is established pursuant to Article 27.5 the proceeds depositary must deliver a copy to the chargeholder, the enterprise administrator, the chargor, any chargeholder shown on the charges' register with a charge over the same charged property and any other person who, to the proceeds depositary's actual knowledge, has or claims to have a right

in the charged property.

27.9 Any person who claims entitlement to the proceeds of sale and does not agree with the list as established by the proceeds depositary may within 21 days of delivery of the list pursuant to Article 27.8 notify the proceeds depositary of his disagreement. In this case the proceeds depositary must deliver to the persons referred to in Article 27.8 either an amended list or a statement that a disagreement has been notified but that the list remains unchanged.

27.10 Where establishment of a definitive list is delayed for any reason, the proceeds depositary may establish a provisional list making full reserve for any undetermined or disputed amounts.

Article 28. Distribution of Proceeds of Sale

28.1 The proceeds depositary must, subject to any order made by the court pursuant to Article 29, distribute the proceeds of sale promptly upon 30 days elapsing after the latest of

28.1.1 receipt by the proceeds depositary of the proceeds of sale; or

28.1.2 delivery of the list pursuant to Article 27.8; or

28.1.3 delivery of the list or statement pursuant to Article 27.9.

28.2 The proceeds depositary may make an initial distribution of proceeds of sale on the basis of a provisional list established pursuant to Article 27.10.

28.3 The proceeds depositary must distribute the proceeds of sale as follows

28.3.1 first, in payment of his fees and costs up to [amount];

28.3.2 second, where an election has been made pursuant to Article 25.3, in payment of the liabilities referred to in Article 28.4.1;

28.3.3 third, where an election has been made pursuant to Article 25.3, in payment of the liabilities referred to in Articles 28.4.2 and 28.4.3;

28.3.4 fourth, to chargeholders of charges over the charged property transferred in accordance with the priorities of their respective charges;

28.3.5 fifth, to other persons with rights in the charged property which entitle them to the proceeds of sale; and

28.3.6 sixth, to the chargor.

28.4 Where an election has been made pursuant to Article 25.3 the following liabilities have priority in any distribution of the proceeds of sale

28.4.1 reasonable remuneration of the enterprise administrator for continuing the enterprise as a going concern but excluding any remuneration or costs in respect of the transfer of the enterprise and any amounts due to an enterprise administrator by reason of termination of his appointment; and

28.4.2 liabilities incurred by the enterprise administrator in continuing the enterprise as a going concern; and

28.4.3 liabilities becoming due under contracts renounced pursuant to Article 25.16 after delivery of the enforcement notice pursuant to Article 22.2 and prior to renunciation excluding any liability arising by reason of such renunciation.

28.5 Where any amount payable by the proceeds depositary pursuant to this Article 28 is payable in a currency other than the currency held by the proceeds depositary he must purchase the necessary amount of that currency to make the payment.

28.6 The proceeds depositary must continue to hold the amount of the proceeds of sale attributable to any secured debt until it becomes payable.

28.7 The secured debt is satisfied to the extent that the proceeds depositary pays proceeds of sale to a chargeholder.

28.8 Any payment by the proceeds depositary to a non-resident chargeholder is treated for the purpose of currency exchange regulations as a payment of the secured debt by the debtor.

Article 29. Court Remedies on Enforcement

29.1 If at any time after delivery of an enforcement notice pursuant to Article 22.2 a chargor, any other chargeholder with a charge over the same charged property or any other party claiming rights in the charged property disputes the creation, validity or enforceability of the charge or claims termination of the charge he may apply to the court to have the enforcement notice declared invalid. Any application under this Article 29.1 must be treated by the court as urgent business [*state time limit for decision*]. Notwithstanding such application until the enforcement notice is declared invalid and subject to any order made by the court pursuant to Articles 29.3 to 29.5

29.1.1 the chargeholder may continue to take protective measures pursuant to Article 23; and

29.1.2 the chargeholder may continue to realise the charge pursuant to Article 24; and

29.1.3 where an election has been made pursuant to Article 25.3 the enterprise administrator may continue to operate the enterprise as a going concern and to realise the charge pursuant to Article 25.

29.2 If the court declares the enforcement notice invalid the chargor or the party who applied to the court may require the chargeholder to present at the charges' registry a request for deregistration of the enforcement notice pursuant to Article 33.1.11.

29.3 If upon an application being made pursuant to Article 29.1 the court is

29.3.1 unable to give its final decision within 60 days of the enforcement notice being delivered pursuant to Article 22.2; and

29.3.2 satisfied that there are reasonable grounds on which to claim that the charge is not created, invalid, or not enforceable or that it has been terminated; and

29.3.3 satisfied that, after taking into account the interests of all the parties, it is appropriate to make an order pursuant to this Article 29.3;

the court may if so requested by the applicant make an interim order that the charged property may not be transferred pursuant to Article 24 or 25 until the court has rendered its final decision. The applicant is under an obligation to present at the charges' registry pursuant to Article 33.1.9 a request for registration of the interim order within seven days of it being made and pursuant to Article 33.1.12 a request for deregistration of the order within seven days of it being terminated. The applicant is liable to third parties for any loss suffered as a result of breach of this obligation.

29.4 A chargor, any other chargeholder with a charge over the same charged property or any other party claiming rights in the charged property who alleges that the chargeholder, the enterprise administrator or the proceeds depositary has failed to comply with the requirements of Articles 22 to 28 may apply to the court for an order

29.4.1 to declare any measure taken which was not in compliance with the requirements of Articles 22 to 28 invalid

subject to Article 26;

29.4.2 requiring the chargeholder, the enterprise administrator or the proceeds depositary to comply with those requirements;

29.4.3 for such other matter as the court considers appropriate.

29.5 A chargor, any other chargeholder with a charge over the same charged property or any other party claiming rights in the charged property who alleges that the chargeholder, the enterprise administrator or the proceeds depositary has taken in relation to enforcement of a charge measures to which he is not entitled may apply to the court for an order

29.5.1 to declare the measures to which the application relates invalid subject to Article 26;

29.5.2 requiring the chargeholder, the enterprise administrator or the proceeds depositary to refrain from taking any further measures to which he is not entitled;

29.5.3 for such other matter as the court considers appropriate.

Article 30. Damages

A chargor, any other chargeholder with a charge over the same charged property or any other party claiming rights in the charged property has an action in damages

30.1 in the case of an enforcement notice declared invalid by the court pursuant to Article 29.1, for any loss suffered by any of them as a result of enforcement; and

30.2 for any loss suffered as a result of any failure by a chargeholder, charge manager, enterprise administrator or proceeds depositary to comply with the requirements of Articles 22 to 28 or as a result of any measure taken by any such person in relation to enforcement of a charge to which he is not entitled.

Article 31. Insolvency Principles

The provisions to be included to cover the event of the insolvency of the chargor have to be drafted jurisdiction by jurisdiction to take into account local insolvency rules. The following basic principles must be respected:

1. The charge remains valid notwithstanding insolvency.

2. Any right to set aside a charge as an act in the period immediately prior to insolvency is in the same terms as for other pre-insolvency acts.

3. Either the charge remains enforceable by the chargeholder separately from insolvency proceedings or the liquidator is under an obligation to transfer the charged property rapidly at a fair price and to satisfy the chargeholder's claim out of the proceeds of sale.

4. The creditors who may rank ahead of the chargeholder in respect of the proceeds of sale are limitatively defined.

Article 32. Termination of a Charge

32.1 A charge terminates if and to the extent that

32.1.1 the chargor and the chargeholder so agree; or

32.1.2 the secured debt is satisfied or otherwise ceases to exist; or

32.1.3 the charged property ceases to exist; or

32.1.4 the charged property is changed or incorporated with another thing or right in such a manner that it ceases to exist in identifiable or separable form; or

32.1.5 the charged property becomes part of another thing or right in such manner that the charged property and the other thing or right are transferable as a single item; or

32.1.6 the charged property becomes owned by the chargeholder; or

32.1.7 in the case of an unpaid vendor's charge, as provided in Article 9.4; or

32.1.8 in the case of a possessory charge pursuant to Article 10, if possession of charged property ceases; or

32.1.9 the secured debt is transferred and the transfer does not extend to the charge; or

32.1.10 a third party acquires title to charged property free from the charge pursuant to Article 21.2; or

32.1.11 a person acquires title to charged property free from any charge pursuant to Article 26.1.

32.2 A charge also terminates if the chargor or another chargeholder with a charge over the same charged property

32.2.1 deposits a sum equal to 130 per cent. of the maximum amount of the secured debt referred to in Article 4.5 or, in the case of an unpaid vendor's charge, of the unpaid part of the purchase price referred to in Article 9.2.1 and in the same currency as the secured debt with a prime bank on terms agreed with the chargeholder or failing agreement on commercial terms then prevailing for similar sums in that currency; and

32.2.2 grants to the chargeholder whose charge is being terminated a registered charge over the sum deposited pursuant to Article 32.2.1 in order to secure the debt previously secured by the charge that is terminated.

32.3 Upon termination of a charge the chargeholder must

32.3.1 in the case of a registered charge, register the termination of the charge pursuant to Article 33.1.10; or

32.3.2 in the case of a possessory charge, return the charged property to the chargor unless otherwise agreed between chargor and chargeholder.

Part 5. Registration

Article 33. Supplementary Registration Statement

33.1 In order to obtain registration of

33.1.1 an amendment to a charging instrument; or

33.1.2 the subsequent appointment of a charge manager; or

33.1.3 the termination of the appointment of a charge manager; or

33.1.4 the transfer of a secured debt extending to a charge; or

33.1.5 a charge against the name of a person who has acquired title to charged property; or

33.1.6 an enforcement notice; or

33.1.7 the termination of the appointment of an enterprise administrator; or

33.1.8 the appointment of a new enterprise administrator; or

33.1.9 an interim order made under Article 29.3; or

33.1.10 the termination of a registered charge; or

in order to obtain deregistration of

33.1.11 an enforcement notice; or

33.1.12 an interim order made under Article 29.3;

a supplementary registration statement must be presented at the charges' registry.

33.2 A supplementary registration statement presented pursuant to Article 33.1 must

33.2.1 identify the charge by reference to the chargor, the date of registration (in the case of a registered charge) and other information as necessary; and

33.2.2 state the purpose of the supplementary registration statement; and

33.2.3 comply with the requirements of Article 33.3.

33.3 A supplementary registration statement presented pursuant to Article 33.1 must also include

33.3.1 in the case of an amendment to a charging instrument pursuant to Article 7.5

33.3.1.1 the date of the charging instrument; and

33.3.1.2 the date of the amendment; and

33.3.1.3 signatures by or on behalf of the chargor and the chargeholder; or

33.3.2 in the case of the subsequent appointment of a charge manager pursuant to Article 16

33.3.2.1 identification of the charge manager; and

33.3.2.2 signatures by or on behalf of the chargeholder and the charge manager; or

33.3.3 in the case of the termination of the appointment of a charge manager pursuant to Article 16

33.3.3.1 identification of the charge manager; and

33.3.3.2 signature by or on behalf of the chargeholder or the charge manager; or

33.3.4 in the case of the transfer of a secured debt extending to a charge pursuant to Article 18.1

33.3.4.1 identification of the transferor and the new chargeholder; and

33.3.4.2 signatures by or on behalf of the transferring chargeholder and the new chargeholder; or

33.3.5 in the case of registration of a charge against the name of a person who has acquired title to charged property as referred to in Article 21.6

33.3.5.1 identification of the person who has acquired title; and

33.3.5.2 signature by or on behalf of the chargeholder; or

33.3.6 in the case of an enforcement notice delivered pursuant to Article 22.2

33.3.6.1 the date of delivery of the enforcement notice; and

33.3.6.2 where the enforcement notice relates to an unpaid vendor's charge or a possessory charge the information required to register such a charge pursuant to Articles 8.4 to 8.6; and

33.3.6.3 where an election has been made pursuant to Article 25.3, a statement that this is the case; and

33.3.6.4 signature by or on behalf of the chargeholder; or

33.3.7 in the case of termination of the appointment of an enterprise administrator pursuant to Article 25.11

33.3.7.1 identification of the enterprise administrator; and

33.3.7.2 signature by or on behalf of the chargeholder; or

33.3.8 in the case of appointment of a new enterprise administrator pursuant to Article 25.12

33.3.8.1 identification of the enterprise administrator; and

33.3.8.2 signatures by or on behalf of the chargeholder and the enterprise administrator; or

33.3.9 in the case of an interim order made under Article 29.3

33.3.9.1 a description of the interim order; and

33.3.9.2 identification of the person who applied for the order; and

33.3.9.3 signature by or on behalf of the person who applied for the order; or

33.3.10 in the case of the termination of a registered charge pursuant to Article 32, signature by or on behalf of the

chargeholder; or

33.3.11 in the case of deregistration of an enforcement notice pursuant to Article 22.6

33.3.11.1 the date of delivery of the enforcement notice; and

33.3.11.2 signature by or on behalf of the chargeholder; or

33.3.12 in the case of deregistration of an interim order made under Article 29.3

33.3.12.1 a description of the interim order; and

33.3.12.2 signature by or on behalf of the person who applied for the order.

33.4 Where there is more than one chargor a separate supplementary registration statement must be presented for each chargor.

Article 34. Registration Procedure

34.1 The registrar may accept a registration statement pursuant to Article 8 or a supplementary registration statement pursuant to Article 33 in such form as he deems fit and can only refuse to register

34.1.1 if the registration statement or supplementary registration statement does not comply with the requirements of Article 8 or 33; or

34.1.2 if the required registration fee is not paid.

34.2 Upon acceptance of a registration statement or a supplementary registration statement the registrar must immediately

34.2.1 mark the time and date of presentation and the stamp of the registration office on the registration statement or supplementary registration statement and, if supplied, on a copy; and

34.2.2 place the registration statement or supplementary registration statement on the register against the name of the chargor and hand the copy, if supplied, to the presenter.

34.3 If the registrar refuses to accept a registration statement or a supplementary registration statement for one of the reasons in Article 34.1 he must at the same time notify the person presenting the registration statement or supplementary registration statement in writing of the reasons for his refusal and that person may present

34.3.1 a new registration statement within the 30 day period pursuant to Article 8.1 or, if later, within 15 days of such notification; or

34.3.2 a new supplementary registration statement within seven days in the cases referred to in Articles 33.1.6 to 33.1.9 or at any time in any other case.

34.4 The time of registration is the time when the registration statement or supplementary registration statement is presented at the charges' registry or, where Article 34.3 applies, the time when the new registration statement or new supplementary registration statement is presented at the charges' registry.

Article 35. Access to the Register

Any person may against payment of the required fee have access to the register and receive a copy of any entry on it.

35.1 The registrar may accept a registration statement pursuant to Article 8 or a supplementary registration statement

pursuant to Article 33 in such form as he deems fit and can only refuse to register

35.1.1 if the registration statement or supplementary registration statement does not comply with the requirements of Article 8 or 33; or

35.1.2 if the required registration fee is not paid.

35.2 Upon acceptance of a registration statement or a supplementary registration statement the registrar must immediately

35.2.1 mark the time and date of presentation and the stamp of the registration office on the registration statement or supplementary registration statement and, if supplied, on a copy; and

35.2.2 place the registration statement or supplementary registration statement on the register against the name of the chargor and hand the copy, if supplied, to the presenter.

35.3 If the registrar refuses to accept a registration statement or a supplementary registration statement for one of the reasons in Article 34.1 he must at the same time notify the person presenting the registration statement or supplementary registration statement in writing of the reasons for his refusal and that person may present

35.3.1 a new registration statement within the 30 day period pursuant to Article 8.1 or, if later, within 15 days of such notification; or

35.3.2 a new supplementary registration statement within seven days in the cases referred to in Articles 33.1.6 to 33.1.9 or at any time in any other case.

35.4 The time of registration is the time when the registration statement or supplementary registration statement is presented at the charges' registry or, where Article 34.3 applies, the time when the new registration statement or new supplementary registration statement is presented at the charges' registry.

Schedule 1. Charging Instrument (Article 7.2 MLST)

Charging Instrument

1. [Name of chargor]

   [Address of chargor]

   [Other identification of chargor as necessary]

   agrees to grant to

   [Name of chargeholder]

   [Address of chargeholder]

   [Other identification of chargeholder as necessary]

   a charge of the things and rights described below to secure the debt described below.

2. The debt secured by the charge is [describe secured debt].

3. [Include identification of person owing the secured debt if not chargor.
   For a possessory charge state maximum amount of secured debt]

4. The things and rights charged are [describe charged property].

5. [Other matters pursuant to Article 7.5]

Signature of chargor and date of signature

Signature of chargeholder

Schedule 2. Registration Statement (Article 8.3 MLST)

Registration Statement

1. [Name, address and other identification as necessary of chargor]

2. [Name, address and other identification as necessary of person owing the secured debt (if not the chargor)]

3. [Name, address and other identification as necessary of chargeholder]

4. [Name address and other identification as necessary of charge manager (if appointed)]

5. [Identification of the secured debt]

6. [Maximum amount of the secured debt]

7. [Identification of the charged property]

8. [If appropriate] The charge is an enterprise charge.

9. [Date of the charging instrument] [Except where an unpaid vendor's charge is being converted into a registered charge]

10. [Where an unpaid vendor's charge is being converted into a registered charge]

    10.1 This registration statement is for the conversion of an unpaid vendor's charge into a registered charge.

    10.2 [Date on which charged property was transferred to the chargeholder]

    10.3 [Date and identification of the written agreement giving rise to the unpaid vendor's charge]

11. [Where a possessory charge is being converted into a registered charge]

    11.1 This registration statement is for the conversion of a possessory charge into a registered charge.

    11.2 [Date on which possession of the charged property was given] [If later than the date of the charging instrument]

Signature of chargor Signature of charge manager (if appointed)

[Or where an unpaid vendor's charge or a possessory charge is being converted into a registered charge

Signature of chargeholder]

Annex 2: Core principles for a secured transactions law prepared by the European Bank for Reconstruction and Development (1997)

Since the publication of the EBRD Model Law in 1994 there has been a continuing programme of reform of security laws in the Bank's countries of operation. During county specific work of the Bank's Legal Transition Team it became evident that the Model Law is an important and helpful instrument for local reformers. However, it became clear that a more general formulation of the goals and principles of successful reform to foster economic development would be useful. This has led EBRD defining a set of ten core principles for a modern secured transaction legislation. These principles form the basis for assessing a country's secured transactions law and for identifying the need for reform.

The principles are drawn on the assumption that the role of a secured transactions law is economic. It is not needed as part of the essential legal infrastructure of a country: its only use is to provide the legal framework which enables a market for secured credit to operate. The principles do not seek to impose any particular solution on a country- there may be many ways of arriving at a particular result – but they do seek to indicate the result that should be achieved. As with any set of general principles of this nature they must be read within the context of the law and practice of any particular country and they do not aim to be absolute; exceptions inevitably have to be made.

1. **Security should reduce the risk of giving credit leading to an increased availability of credit on improved terms.**

This goes to the basic assumption made by EBRD on all its work on secured transactions law reform.

2. **The law should enable the quick, cheap and simple creation of a proprietary security right without depriving the person giving the security of the use of his assets.**

In most market economy scenarios depriving the debtor of the use of his assets is self-defeating; non-possessory security wqhich gives a remedy attached to the charged asset is an essential element of a modern secured transactions law. Any delay, cost or complexity in the creation process reduces the economic efficiency of security.

3. **If the secured debt is not paid the holder of security should be able to have the charged assets realised and to have the proceeds applied towards satisfaction of his claim prior to the other creditors.**

The exact nature of the proprietary right that arises when security is granted has to be defined in the context of the relevant laws. If it is to be effctive it must link to the creditor's claim the remedy of recovering from the assets given as security.

4. **Enforcement procedures should enable prompt realisation at market value of the assets given as security.**

A remedy is only as good as the procedures and practice for exercising it allow it to be. If the value received on realisation is expected to be only half the market value, then the provider of credit will require more assets to be given as security. If it is expected that enforcement will take two years then the creditor will give less favourable credit terms to the debtor.

5. **The security right should continue to be effective and enforceable after the bankruptcy or insolvency of the person who has given it.**

The position against which the creditor most wants protection is the insolvency of the debtor. Any reduction of rights or dilution of priority upon insolvency will reduce the value of security. A limited exception to this principle may be necessary to make it compatible with rules which permit a moratorium at the commencement of insolvency.

6. The costs of taking, maintaining and enforcing security should be low.

A person granting credit will usually ensure that all costs connected with the credit are passed on to the debtor. High costs of security will be reflected in the price for credit and will diminish the efficiency of the credit market.

7. Security should be available (a) over all types of assets (b) to secure all types of debts and (c) between all types of person.

The principle covers a multitude of issues that may arise between the way law is applied ant the needs of commercial reality. They may appear technical but can be of critical importance when seeking to implement a commercial agreement. With very limited exceptions (e.g. personal clothing) a person should be able to give security over any of his assets, including assets he may acquire in the future. Similarly a charge should be capable of securing any type of present or future debt or claim that can be expressed in money terms. The charged assets and the secured debt should be capable of general description (e.g., all machines in a factory , all debts arising under sales contract). It should also be possible to charge constantly changing 'pools' of assets such as inventory, debts receivable and stocks of equipment and to secure fluctuating debts such as the amount due under a bank overdraft facility. Any physical or legal person (whether in the public or private sector) who is permitted by law to transfer property should be able to grant security.

8. There should be an effective means of publicising the existence of security rights.

Where security is possessory the mere fact that the assets are held by the creditor is enough to alert third parties that the debtor has charged them. Where security is non-possessory some other means (normally a public registry or notification system) is needed to ensure that third parties do not acquire charged assets without being made aware of the existence of the charge.

9. The law should establish rules governing competing rights of persons holding security and other persons claiming rights in the assets given as security.

Even when an effective means of publicity is in place there remain some cases for which the law has to provide, for example sales of charged assets in the ordinary course of the owner's business (where the purchaser cannot be expected to inspect a register before purchasing)

10. As far as possible the parties should be able to adapt security to the needs of their particular transaction.

The law is there to facility the operation of the secured credit market and to ensure that necessary protections are in place to prevent debtor, creditor or third parties being unfairly prejudiced by secured transactions. It should not be the purpose of the law to create rules and structures for the operation of secured credit which are aimed principally at directing the manner in which parties to secured credit should structure their transaction.

Bibliography

Akahane, Takashi, The EBRD's Model Law on Secured Transactions: new developments in Law in Transition Autumn/Winter 1997, S. 12

Akerlof, George A., (1970) The market for "lemons": qualitative uncertainty and the market mechanism in 84 Quarterly Journal of Economics, pp. 488-500

Albrecht, Barthold, Transformation durch Partizipation. Die Bedeutung alternativer Privatisierungsmethoden für den Erfolg der Reformen in Osteuropa (Frankfurt a.M., New York 1996), pp. 185-7

Albrecht, Barthold, Privatization, Coordination and Agency Costs: The Case for Participation in Eastern Europe in 1996 International Tax and Public Finance 3, pp. 351-68

Alexy, Robert, Theorie der Grundrechte (Frankfurt am Main 1986)

Ali, P.A.U., The Law of Secured Finance. An International Survey of Security Interests over Personal Property (Oxford 2002)

Allan, David E. and Ulrich Drobnig, Secured Credit in Commercial Insolvencies. A Comparative Analysis in 1980 RabelsZ 44, pp. 615-48

Allen & Overy and European Bank for Reconstruction and Development (eds.), Guide for Taking Charges in the Slovak Republic (without place 2003)

Anderson, Ronald A., Uniform Commercial Code (Rochester 1981 ff.)

Anderson, Ronald A., Ivan Fox and David P. Twomey, Business Law and the Legal Environment (Cincinnati/Ohio 1993)

Bailey III, Henry J. and Richard B. Hagedorn, Secured Transactions in a Nutshell, 3rd ed. (St. Paul/Minn. 1988)

Baird, Douglas G. and Thomas H. Jackson, Cases, Problems, and Materials on Security Interests in Personal Property (Mineola, New York 1984)

Bates, Jonathan, EBRD's model law on secured transactions in Project Finance International 4 August 1994, pp. 36-8

Bates, Jonathan, EBRD's Model law on secured transactions and the reform process in The Moscow letter January 1995, pp. 114-6

Bates, Jonathan, Lane Blumenfeld, David Fagelson, Vladimir Fedorov, Dmitry Labin, Jan-Hendrik Röver and John Simpson (eds.), International Conference on Secured Commercial

Lending in the Commonwealth of Independent States. Conference Proceedings (London, Maryland 1995)

Baur, Fritz, Konkurs- und Vergleichsrecht, 2nd ed. (Heidelberg 1983)

Baur, Fritz, Lehrbuch des Sachenrechts, 12th ed. (Munich 1983)

Baur and Stürner, Lehrbuch des Sachenrechts, 16th ed (Munich 1992)

Bazinas, Spiros, An International Legal Regime for Receivables Financing: UNCITRAL's Contribution in 8 Duke Journal of Comparative & International Law 1998, pp. 315-58

Becker, Christoph, Maßvolle Kreditsicherung (Köln, Berlin, Bonn, München 1999)

Becker-Eberhard, Ekkehard, Die Forderungsgebundenheit der Sicherungsrechte (Bielefeld 1993)

Bell, Andrew P., Modern Law of Personal Property in England and Wales (London, Edinburgh 1989)

Berman, Nathaniel, Aftershocks: Exoticization, Normalization, and the Hermeneutic Compulsion in (1997) Utah L. Rev., p. 281

Bernstein, Peter L., Against the Gods. The Remarkable Story of Risk (New York, Chichester, Brisbane, Toronto, Singapore 1996)

Boguslawskij, Mark M., The Model Law from the Russian Perspective in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on 16 April 1994 in St Petersburg (London 1994), pp. 5-9

Bókai, Judit and Orsolya Erdôs Szeibert, Die Mobiliarhypothek und deren Register in Bundesnotarkammer (ed.), Festschrift für Helmut Schippel zum 65. Geburtstag (München 1996), pp. 843-67

Braun, Hans-Dieter, Zur nachträglichen einseitigen Begründung eines Globalvorbehalts in BB 1978, pp. 22-6

Braun, Hans-Dieter, Kontokorrentvorbehalt und Globalvorbehalt (Heidelberg 1980)

Bridge, Michael, Personal Property Law, 2nd ed. (London 1996)

Canaris, Claus-Wilhelm, Handelsrecht, 22nd ed. (Munich 1995)

Canaris, Claus-Wilhelm, Bankvertragsrecht, 3rd ed. (Berlin, New York 1988)

Canaris, Claus-Wilhelm, Bewegliches System und Vertrauensschutz im rechtsgeschäftlichen Verkehr in Franz Bydlinski, Heinz Krejci, Bernd Schilcher and Viktor

Steininger (eds.), Das Bewegliche System im geltenden und künftigen Recht (Wien, New York 1986), pp. 103-16

Canaris, Claus-Wilhelm, Die Rechtsfolgen rechtsgeschäftlicher Abtretungsverbote in Ulrich Huber and Erik Jayme (eds.), Festschrift für Rolf Serick zum 70. Geburtstag (Heidelberg 1992), pp. 9-35

Carbonnier, Jean, Droit civil, vol. 1: Introduction, les personnes, 16th ed. (Paris 1987)

Clark, Barkley, The Law of Secured Transactions under the Uniform Commercial Code (Boston/Mass. 1993) (loose-leaf)

Coase, Ronald H., The Firm, the Market, and the Law (Chicago, London 1990)

Collier, J.G., Conflict of Laws (Cambridge, New York, New Rochelle, Melbourne, Sydney 1987)

Coogan, Peter F., William E. Hogan, Detlev F. Vagts and Julian B. McDonnell, Secured Transactions under the Uniform Commercial Code (New York) (loose-leaf)

Cuming, Ronald C.C. and Roderick J. Wood, Saskatchewan and Manitoba Personal Property Security Acts Handbook (no place [Carswell Thomson Professional Publishing] 1994)

Curran, Vivian Grosswald, Cultural Immersion, Difference and Categories in U.S. Comparative Law in (1998) 46 Am.J.Comp.L., p. 43

Dageförde, Carsten, Five years of the Secured Transactions Project - a survey in Law in Transition Spring 1997, pp. 12-3

Dageförde, Carsten, Das besitzlose Mobiliarpfandrecht nach dem Modellgesetz für Sicherungsgeschäfte der Europäischen Bank für Wiederaufbau und Entwicklung (EBRD Model Law on Secured Transactions) in 1998 ZEuP, pp. 686-700

Dahan, Frédérique and Gerard McCormack, Secured Transactions in Countries in Transition (The Case of Poland): From Model to Assessment in 1999 European Business Law Review, p. 85

Dahan, Frédérique and Gerard McCormack, International Influences and the Polish Law on Secured Transactions: Harmonisation, Unification or What? in Uniform Law Review 2002-3, pp. 713-36

Dalhuisen, Jan Hendrik, Security in Movable and Intangible Property, Finance Sales, Future Interests and Trusts in A.S. Hartkamp, M.W. Hesselink, E.H. Hondius, C.E. du Perron and J.B.M. Vranken (eds.), Towards a European Civil Code (Nijmegen, Dordrecht 1994), pp. 361-89

Dalhuisen, Jan Hendrik, International Aspects of Secured Transactions and Finance Sales Involving Movable and Intangible Property in D. Kokkini-Iatridou and F.W. Grosheide (eds.), Eenvormig en Vergelijkend Privaatrecht 1994 (Lelystad 1994), pp. 405-46

Dalhuisen, Jan Hendrik, Dalhuisen on International Commercial, Financial and Trade Law (Oxford, Portland/Oregon 2000)

David, René and John E.C. Brierley, Major Legal Systems in the World Today. An Introduction to the Comparative Study of Law, 3rd ed. (London 1985)

David, René and Camille Jauffret Spinosi, Les grands systèmes de droit contaimporains, 8th ed. (Paris 1982)

Diamond, Aubrey L., A Review of Security Interests in Property (London 1989)

Dowmunt-Iwaszkiewicz, Aniela, Juliette Roggeman and Karen Wasserman, Un nouveau droit des sûretés pour les pays d'Europe de l'est. La loi-modèle sur les sûretés de la Banque Européenne pour la Reconstruction et le Développement (BERD), 2 vols. (diss. Paris I Pantheon-Sorbonne 1995)

Drobnig, Ulrich, Das trust receipt als Sicherungsmittel im amerikanischen und englischen Recht in 1961 RabelsZ 26, pp. 401-66

Drobnig, Ulrich, Methodenfragen der Rechtsvergleichung im Lichte der „International Encyclopedia of Comparative Law in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds.), Ius Privatum Gentium. Festschrift für Max Rheinstein zum 70. Geburtstag am 5. Juli 1969 (Tübingen 1969), pp. 221-33

Drobnig, Ulrich, Empfehlen sich gesetzliche Maßnahmen zur Reform der Mobiliarsicherheiten? Gutachten F für den 51. Deutschen Juristentag (Munich 1976)

Drobnig, Ulrich, Legal principles governing security interests (document A/CN.9/131 and annex) in UNCITRAL Yearbook, vol. VIII (1977), part 2, II, A = pp. 171-221

Drobnig, Ulrich, Vergleichende und kollisionsrechtliche Probleme der Girosammelverwahrung von Wertpapieren im Verhältnis Deutschland-Frankreich in Herbert Bernstein, Ulrich Drobnig and Hein Kötz (eds.), Festschrift für Konrad Zweigert zum 70. Geburtstag (Tübingen 1981), pp. 73-92

Drobnig, Ulrich, Dokumentenloser Effektenverkehr in Karl Kreuzer (ed.) Abschied vom Wertpapier? Dokumentenlose Wertbewegungen im Effekten-, gütertransport- und Zahlungsverkehr. Arbeitssitzung der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht anläßlich der gemeinsamen Tagung der Deutschen und Österreichischen Gesellschaft für Rechtsvergleichung in Innsbruck vom 16.-19.9.1987 (Neuwied, Frankfurt a.M. 1988), pp. 11-41

Drobnig, Ulrich, First working draft of the Model Law on Security Rights for Eastern Europe in Law in Transition Autumn 1993, pp. 7-9

Drobnig, Ulrich, The Comparative Approach of the EBRD's Model Law in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on 16 April 1994 in St Petersburg (London 1994), pp. 1-2

Duncan, R.F. and W.H. Lyons, The Law and Practice on Secured Transactions: Working with Article 9 (New York 1989)

Edwards, John, The International Practitioner's View on the Model Law in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on 16 April 1994 in St Petersburg (London 1994), pp. 10-3

Eidenmüller, Horst, Rights, Systems of Rights, and Unger's System of Rights: Part 1 in 10 Law and Philosophy, pp. 1-28

Eidenmüller, Horst, Rights, Systems of Rights and Unger's System of Rights: Part 2 in 10 Law and Philosophy, pp. 119-59

Einsele, Dorothee, Wertpapierrecht als Schuldrecht. Funktionsverlust von Effektenurkunden im internationalen Rechtsverkehr (Tübingen 1994)

Engisch, Karl, Die Idee der Konkretisierung in Recht und Rechtswissenschaft unserer Zeit (Heidelberg 1968)

Esser, Josef, Grundsatz und Norm in der richterlichen Fortbildung des Privatrechts. Rechtsvergleichende Beiträge zur Rechtsquellen- und Interpretationslehre, 4th ed. (Tübingen 1990)

Esser, Josef, Vorverständnis und Methodenwahl in der Rechtsfindung. Rationalitätsgrundlagen richterlicher Entscheidungsfindung (Frankfurt am Main 1972)

Eucken, Walter, Grundsätze der Wirtschaftspolitik, 6th ed. (Tübingen 1990)

Fahrholz, Bernd, Neue Formen der Unternehmensfinanzierung. Unternehmensübernahmen, Big ticket-Leasing, Asset Backed- und Projektfinanzierungen (Munich 1998)

Fairgrieve, Duncan, Reforming Secured Transactions Laws in Central and Eastern Europe in 1998 European Business Law Review, p. 245

Ferran, Eilís, Company law and corporate finance (Oxford 1999)

Feuer, Guy and Hervé Cassan, Droit international du développement, 2nd ed. (Paris 1991)

Fikentscher, Wolfgang, Methoden des Rechts in vergleichender Darstellung, vol. III: Mitteleuropäischer Rechtskreis (Tübingen 1976)

Fikentscher, Wolfgang, Schuldrecht, 8th ed. (Berlin, New York 1992)

Fikentscher, Wolfgang, Modes of Thought. A Study in the Anthropology of Law and Religion (Tübingen 1995)

Fikentscher, Wolfgang and Josef Drexl, Der Draft International Code. Zur institutionellen Struktur eines künftigen Weltkartellrechts in Recht der internationalen Wirtschaft 1994, pp. 93-9

Fikentscher, Wolfgang and Andreas Heinemann, Der "Draft International Antitrust Code" - Initiative für ein Weltkartellrecht im Rahmen des GATT in Wirtschaft und Wettbewerb 1994, pp. 97-107

Firnhaber, Dietrich, Grund und Bedingungen eines einheitlichen Mobiliarsicherungsrechtes in Europa (unpublished draft diss. paper Darmstadt 1999)

Fleisig, Heywood, Economic Functions of Security in a Market Economy in Joseph Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1997), pp. 15-38

Forkel, Hans, Grundfragen der Lehre vom privatrechtlichen Anwartschaftsrecht (Berlin 1962)

Frankenberg, Günter, Critical Comparisons: Re-thinking Comparative Law in (1985) 26 Harv. Int'l L.J., pp. 411-55

Frankenberg, Günter, Stranger than Paradise: Identity & Politics in Comparative Law in (1997) Utah L. Rev. p. 259

Galbraith, John Kenneth, Economics in Perspective. A Critical History (Boston 1987)

Gárdos, István and Ilona Bánhegyi, EBRD-zálogjogmodell in Bank & Tözsde of 7 March 1993, p. 19

Gárdos, István, New Hungarian legislation on security interests: an improvement in the Hungarian secured lending environment in Law in Transition Summer 1996, pp. 1-6

Garro, Alejandro M., Security Interests in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform in (1987) Houston Journal of International Law 9, pp. 157-242

Garro, Alejandro M., The Reform and Harmonization of Personal Property Security Law in Latin America in (1990) Revista Juridíca Universidad de Puerto Rico 59, pp. 1-155

Gavalda, Christian, L'assemblée du Conseil des Gouverneurs de la B.E.R.D. Un Modèle de loi uniform sur les sûretés des conventions passées avec les pays de l'est élaboré par l'Office du Conseil Général de la B.E.R.D. Révision de Saint-Pétersbourg des 15 au 19 Avril 1994 in Les Petites Affiches of 8 June 1994, pp. 6-10

Gerber, David J., Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the New Europe in (1994) AJCL XLII, pp. 25-84

Gierke, Julius von, Das Handelsunternehmen in 1948 ZHR vol. 111, pp. 7-11

Gilmore, Grant, Security Interests in Personal Property, 2 vols. (Boston, Toronto 1965)

Giuliano, Mario and Paul Lagarde, Report on the Convention on the law applicable to contractual obligations in OJ 1980 No C 282, pp. 1-42

Goode, Roy, Legal Problems of Credit and Security (2nd ed., London 1988)

Goode, Roy, Commercial Law (London 1982); 2nd ed. (London 1995)

Goode, Roy, Proprietary Rights and Insolvency in Sales Transactions, 2nd ed. (London 1989)

Goode, Roy, Principles of Corporate Insolvency Law (London 1990)

Goode, Roy, Security Interests in Movables under English Law in Kreuzer (ed.), Mobiliarsicherheiten - Vielfalt oder Einheit? (Baden-Baden 1998)

Goode, Roy and L.C.B. Gower, Is Article 9 of the Uniform Commercial Code Exportable? An English Reaction in Jacob S. Ziegel and William F. Foster (eds.), Aspects of Comparative Commercial Law: Sales, Consumer Credit, and Secured Transactions (Montreal, Dobbs Ferry/N.Y. 1969), pp. 298-349

Gough, William James, Company Charges, 2nd ed. (London etc. 1996)

Gower, L.C.B., Gower's Principles of Modern Company Law, 5th ed. (London 1992)

Gretton, George L., Mixed Systems: Scotland in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, The Hague, Boston 1998), pp. 279-92

Guest, Anthony G. and Eva Lomnicka, An Introduction to the Law of Credit and Security (London 1987)

Guynn, Randall D., James Steven Rogers, Kazuaki Sono and Jürgen Than, Modernizing Securities Ownership, Transfer and Pledging Laws. A Discussion Paper on the Need for International Harmonization (London [International Bar Association] 1997)

Hadding, Walther and Uwe H. Schneider (eds.), Gesellschaftsanteile als Kreditsicherheit (Berlin 1979)

Lord Hailsman of St. Marylebone (ed.), Halsbury's Laws of England, 4th ed. Reissue (London 1973 ff.), vols. 3 (1), 6, 7 (2), 32

Harmathy, Attila, The Hungarian Experience with the Model Law in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on 16 April 1994 in St Petersburg (London 1994), pp. 3-4

Harmathy, Attila, The EBRD Model Law and the Model Law in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998)

Harmathy, Attila, Das Recht der Mobiliarsicherheiten - Kontinuität und Entwicklung in Ungarn in Karl F. Kreuzer (ed.), Mobiliarsicherheiten. Vielfalt oder Einheit? (Baden-Baden 1999), pp. 75-90

Harrell, Thomas A., A Guide to the Provisions of Chapter Nine of Louisiana's Commercial Code in (1990) La. L. Rev. 50, pp. 711-96

Heck, Philipp, Grundriß des Sachenrechts (Tübingen 1930)

Heilbronner, Robert, Worldly Philosophers. The Lives, Times and Ideas of the Great Economic Thinkers, 6th ed. (London 1991)

Heinemann, Andreas, Die Freiburger Schule und ihre geistigen Wurzeln (Munich 1989)

Henson, Ray D., Secured Transactions under the Uniform Commercial Code, 2nd ed. (St. Paul/Minn. 1979)

Higson, Chris, Business Finance 2nd ed. (London, Dublin, Edinburgh 1995)

Hill, Jonathan, Comparative Law, Law Reform, and Legal Theory in (1989) 9 Oxford J. Leg. Stud., p. 101

Hueck, Alfred and Claus-Wilhelm Canaris, Recht der Wertpapiere, 12th ed. (Munich 1986)

Kelman, M., A Guide To Critical Legal Studies (Cambridge Mass. 1987)

Kennedy, David, New Approaches to Comparative Law: Comparativism and International Governance in (1997) Utah L. Rev., p. 545

Kieninger, Eva-Maria, Mobiliarsicherheiten im Europäischen Binnenmarkt. Zum Einfluß der Warenverkehrsfreiheit auf das nationale und internationale Sachenrecht der Mitgliedstaaten (Baden-Baden 1996)

Kötz, Hein, Rights of Third Parties. Third Party Beneficiaries and Assignment in International Encyclopedia of Comparative Law, vol. VII: Arthur von Mehren (ed.), Contracts in General, chapter 13 (Tübingen, Dordrecht, Boston, Lancaster 1992)

Kouvshinov, Vladislav A., EBRD Model Law on Secured Transactions and Russian Federation Legislation on Pledge and Mortgage (paper given at the seminar "Current Trends in the Modernisation of the Law Governing Personal Property Security" held by UNIDROIT and the International Bar Association on 28 November 1994 in Rome; unpublished)

Kreuzer, Karl F., Europäisches Mobiliarsicherungsrecht oder: Von den Grenzen des Internationalen Privatrechts in Conflits et harmonisation. Mélanges en l'honneur d'Alfred E. von Overbeck (Freiburg i.Ue. 1990), pp. 613-41

Kreuzer, Karl, The Model Law on Secured Transactions of the EBRD from a German Point of View in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998), pp. 175-95

Larenz, Karl, Lehrbuch des Schuldrechts, vol. I: Allgemeiner Teil, 13th ed. (Munich 1982)

Larenz, Karl and Claus-Wilhelm Canaris, Methodenlehre der Rechtswissenschaft, 3rd ed. (Berlin etc. 1995)

Lawson, F.H. and Bernhard Rudden, Law of Property, 2nd ed. (Oxford 1982)

Leenen, Detlef, Typus und Rechtsfindung (1971)

Legrand, Pierre, Fragments on Law-as-Culture (Deventer 1999)

Legrand, Pierre, Le Droit Comparé (1999)

Legrand, Pierre, Review of "Walter van Gerven et al. (eds.), Torst (Oxford 1998)" in (1999) C.L.J., pp. 439-42

Lempenau, Gerhard, Direkterwerb oder Durchgangserwerb bei Übertragung künftiger Rechte (Bad Homburg v.d.H., Berlin, Zürich 1968

Lipstein, Kurt, Introduction: Some Comparisons with English Law in Rolf Serick, Securities in Movables in German Law: An Outline (translated by Tony Weir) (Deventer, Boston 1990), pp. 1-14

Lüke, Wolfgang, Zivilprozessrecht. Erkenntnisverfahren, Zwangsvollstreckung, 8th ed. (Munich 2003)

Lyotard, François, La condition postmoderne: Rapport sur le savoir (1979)

Mann, F.A., The Legal Aspects of Money, 4th ed. (Oxford 1982)

Marotzke, Wolfgang, Das Anwartschaftsrecht - ein Beispiel sinnvoller Rechtsfortbildung? Zugleich ein Beitrag zum Recht der Verfügungen (Berlin 1971)

Mattei, Ugo, Comparative Law and Economics (Ann Arbor 1997).

McCormack, Gerard, Reservation of Title (London 1990)

McCormack, Gerard and Frédérique Dahan, The EBRD Model Law on Secured Transactions: Comparisons and Convergence in 1998 Company, Financial and Insolvency Law Review, p. 65

Medicus, Dieter, Kreditsicherung durch Verfügung über künftiges Recht in JuS 1967, p. 385

Medicus, Dieter, Die Akzessorietät im Privatrecht in Juristische Schulung 1971, pp. 497-504

Medicus, Dieter, Bürgerliches Recht. Eine nach Anspruchsgrundlagen geordnete Darstellung zur Examensvorbereitung, 15th ed. (Köln, Berlin, Bonn, Munich 1991)

Medicus, Dieter, Schuldrecht I. Allgemeiner Teil. Ein Studienbuch, 12th ed. (Munich 2000); 13th ed. (Munich 2002),

Medicus, Dieter, Allgemeiner Teil des BGB, 8th ed. (Heidelberg 2002)

Milger, Karin, Mobiliarsicherheiten im deutschen und US-amerikanischen Recht – eine rechtsvergleichende Untersuchung (Göttingen 1982)

Mill, John Stuart, A system of logic: ratiocinative and inductive, being a connected view of the principles of evidence and the methods of scientific investigation (1843) = The Logic of the Moral Sciences (Chicago, LaSalle/Illinois 1994)

Mistelis, Loukas, The EBRD Model Law on Secured Transactions and Its Impact on Collateral Law Reform in Central and Eastern Europe and the former Soviet Union in 1998 Parker School Journal of East European Law 5, p. 455

Mülbert, Peter O., Das inexistente Anwartschaftsrecht und seine Alternativen in (2002) 202 AcP, pp. 912-50

Münchener Kommentar zum Bürgerlichen Gesetzbuch, vol. 3, 3rd ed. (Munich 1995); vol. 6, 3rd ed. (Munich 1997)

Newburg, Andre, The Nuclear Safety Account in Law in Transition Autumn 1995, pp. 7-8

Newburg, Andre, Some Reflections on the Role of Law in the Transition Process in (August 1995) International Practitioner's Notebook, Nos. 58 and 59, pp. 22-4

Newburg, Andre, Legal Assistance in Eastern Europe: The EBRD's Model Law on Secured Transactions in: Albrecht Weber with Ludwig Gramlich, Ulrich Häde, Franz Zehetner (eds.), Währung und Wirtschaft. Das Geld im Recht. Festschrift für Hugo J. Hahn zum 70. Geburtstag (Baden-Baden 1997), pp. 441-46

North, Douglass C. and Robert Paul Thomas, The Rise of the Western World. A New Economic History (Cambridge 1973)

North, Douglass C., Institutions, Institutional Change and Economic Performance (Cambridge 1990)

Esik Örücü, Review of "Pierre Legrand, Fragments on Law-as-Culture (Deventer 1999)" and "Pierre Legrand, Le Droit Comparé (1999)" in (2000) 49 ICLQ, pp. 996-7

Palandt, BGB, 62th ed. (Munich 2003)

Paulus, Christoph, Grundfragen des Kreditsicherungsrecht in Juristische Schulung 1995, pp. 185-92

Pennington, Robert R., Company Law, 7th ed. (London, Dublin, Edinburgh 1995)

Pennington, Robert R., Corporate Insolvency Law (London, Dublin, Edinburgh 1991)

Peters, Anne and Heiner Schwenke, Comparative Law Beyond Post-Modernism in (2000) 49 ICLQ, pp. 800-34

Posner, Richard, Economic Analysis of Law, 4th ed. (Boston, Toronto, London 1992)

Rabel, Ernst, International Tribunals for Private Matters in The Arbitration Journal 1948, pp. 209-212

Ragin, Charles C., The Comparative Method: Moving Beyond Qualitative and Quantitative Strategies (Berkeley, Los Angeles, London 1989)

Ragin, Charles C., Fuzzy-Set Social Science (Chicago 2000)

Raiser, Ludwig, Dingliche Anwartschaften (Tübingen 1961)

Rajani, Shashi, Fixed charge over company's book debts after Brumark in 17 Insolvency Law & Practice 2001, pp. 125-8

Rakob, Julia, Ausländische Mobiliarsicherungsrechte im Inland, Heidelberg 2001;

Rice, Robert, Clearing the way for capital in Financial Times of 14 June 1994, p. 20

Richter, Rudolf, Institutionen ökonomisch analysiert. Zur jüngeren Entwicklung auf einem Gebiet der Wirtschaftstheorie (Tübingen 1994)

Riesenfeld, Stefan, Introduction: Some Comparisons with American Law in Rolf Serick, Securities in Movables in German Law: An Outline (translated by Tony Weir) (Deventer, Boston 1990), pp. 15-20

Röver, Jan-Hendrik, Security in central and eastern Europe and the EBRD's Model Law on Secured Transactions in Law in Transition Autumn 1994, pp. 10-4

Röver, Jan-Hendrik, The Model Law on Secured Transactions Prepared by the European Bank for Reconstruction and Development for the Countries of Central and Eastern Europe and the Commonwealth of Independent States (paper given at the seminar "Current Trends in the Modernisation of the Law Governing Personal Property Security" held by UNIDROIT and the International Bar Association on 28 November 1994 in Rome; unpublished)

Röver, Jan-Hendrik and John Simpson, General Principles of a Modern Secured Transactions Law (London 1997)

Röver, Jan-Hendrik, Das EBWE-Modellgesetz für Sicherungsgeschäfte in Karl F. Kreuzer (ed.), Mobiliarsicherheiten - Vielfalt oder Einheit? (Baden-Baden 1998), pp. 125-34

Röver, Jan-Hendrik, An Approach to Legal Reform in Central and Eastern Europe: The European Bank's Model Law on Secured Transactions in 1998/99 European Journal of Law Reform vol. 1, pp. 119-35

Röver, Jan-Hendrik, Prinzipien dinglicher Sicherheiten. Eine Studie zur Methode der Rechtsvergleichung (Munich 1999) (herein quoted as: Jan-Hendrik Röver, Prinzipien)

Röver, Jan-Hendrik, Projektfinanzierung in Ulf R. Siebel (ed.), Projekte und Projektfinanzierung (Munich 2001), chapter 6 = pp. 153-241

Röver, Jan-Hendrik and John Simpson, General Principles of a Modern Secured Transactions Law (London 1997)

Rogers, Catherine, Gulliver's Troubeled Travels, or the Conundrum of Comparative Law in (1998) 67 George Washington L.Rev., p. 149

Rott, Thilo, Vereinheitlichung des Rechts der Mobiliarsicherheiten. Möglichkeiten und Grenzen im Kollisions-, Europa-, Sach- und Vollstreckungsrecht unter Berücksichtigung des US-amerikanischen Systems der Kreditsicherheiten (Tübingen 2000)

Rüll, Stefan, Das Pfandrecht an Fahrnis für künftige oder bedingte Forderungen gemäß § 1204 Absatz II BGB (diss. Munich 1986)

Schmidt, Karsten, Zur Akzessorietätsdiskussion bei Sicherungsübereignung und Sicherungsabtretung in Ulrich Huber and Erik Jayme (eds.), Festschrift für Rolf Serick zum 70. Geburtstag (Heidelberg 1992), pp. 329-50

Schlesinger, Rudolf B., Research on the General Principles of Law Recognized by Civilized Nations. Outline of a New Project in 1957 AJIL vol. 51, pp. 734-53

Schlesinger, Rudolf B., The Common Core of Legal Systems. An Emerging Subject of Comparative Study in Kurt H. Nadelmann, Arthur T. von Mehren and John N. Hazard

(eds.), XXth Century Comparative and Conflicts Law. Legal Essays in Honor of Hessel E. Yntema (Leiden 1961), pp. 65-79

Schlesinger, Rudolf B. (ed.), Formation of Contracts. A Study of the Common Core of Legal Systems, 2 vols. (Dobbs Ferry/N.Y., London 1968).

Schlesinger, Rudolf B., Comparative Law. Cases - Texts - Materials, 4th ed. (New York 1980)

Schlesinger, Rudolf B., Hans W. Baade, Mirjan Damaska and Peter E. Herzog, Comparative Law. Cases - Texts - Materials, 5th ed. (New York 1988)

Schlesinger, Rudolf B., The Past and Future of Comparative Law in 1995 ACJL vol. 43, pp. 477-81

Schricker, Gerhard (ed.), Urheberrecht. Kommentar (Munich 1987)

Seif, Ulrike, Der Bestandsschutz besitzloser Mobiliarsicherheiten im deutschen und englischen Recht (Tübingen 1997)

Serick, Rolf, Bemerkungen zu formularmäßig verbundenen Verlängerungs- und Erweiterungsformen beim Eigentumsvorbehalt und der Sicherungsübertragung in BB 1971, pp. 2-10

Serick, Rolf, Eigentumsvorbehalt und Sicherungsübertragung. Neue Rechtsentwicklungen, 2nd ed. (Heidelberg 1993) = Securities in Movables in German Law: An Outline (translated by Tony Weir) (Deventer, Boston 1990)

Simpson, John L., New System for the registration of charges in Hungary in Law in Transition Summer 1996, pp. 7-10

Simpson, John, Ten years of secured transactions reform in 2001 Butterworths Journal of International Banking and Financial Law, p. 5

Simpson, John and Jan-Hendrik Röver, Law on Secured Transactions - Discussion Paper, 10 December 1992

Simpson, John and Jan-Hendrik Röver, Second working draft of the Model Law in Law in Transition Autumn 1993, pp. 10-1

Simpson, John and Jan-Hendrik Röver, Comments on the UNIDROIT project for drawing up a check list of the issues to be addressed in a possible future model law in the general field of secured transactions, UNIDROIT, 1994, Study LXXIIA-Doc. 3

Simpson, John and Jan-Hendrik Röver, Model Law on Secured Transactions completed in Law in Transition Winter/Spring 1994, pp. 1-2

Simpson, John and Jan-Hendrik Röver, Preface in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions. Speeches given at the Presentation of the Model Law during the Third Annual Meeting of the EBRD on 16 April 1994 in St Petersburg (London 1994), p. iii

Simpson, John and Jan-Hendrik Röver, Introduction in European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994), pp. v-vii = An Introduction to the European Bank's Model Law on Secured Transactions in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and the Role of International Financial Organisations (London, Den Haag, Boston 1996), pp. 165-170 = *ibid.* in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998), pp. 439-43

Simpson, John and Jan-Hendrik Röver, EBRD Model Law on Secured Transactions. A Response to Comments by John A. Spanogle (September 1994) (Washington 1995)

Simpson, John and Jan-Hendrik Röver, The EBRD's Secured Transactios Project: a progress report in Law in Transition Spring 1996, pp. 20-4

Simpson, John and Jan-Hendrik Röver, Comments on the Draft Federal Act on Mortgage (Pledge of Real Estate) of the Russian Federation (London 1996)

Simpson, John and Jan-Hendrik Röver, An Introduction to the European Bank's Model Law on Secured Transactions, in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Marktes and the Role of International Financial Organisations (London, The Hague, Boston 1996), pp. 165-70

Simpson, John L. and Jan-Hendrik M. Röver, General Prinicples of a Modern Secured Transactions Law in 1997 NAFTA Law Review III, pp. 73-81 = *dto.* in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998), pp. 143-55

Smith, Adam, An Inquiry into the Nature and Causes of the Wealth of Nations (ed. by R.H. Campbell, A.S. Skinner and W.B. Todd), vol. I, II (Oxford 1979)

Smith, Adam, Theory of Moral Sentiments (D.D. Raphael and A.L. Macfie [eds.]) (Oxford 1978).

Smith, Adam, Lectures on Jurisprudence (R.L. Meek, D.D. Raphael and P.G. Stein [eds.]) (Oxford 1978)

Spanogle, John A., EBRD Model Law on Secured Transactions (Washington 1994)

Spanogle, John A., A Functional Analysis of the EBRD Model Law on Secured Transactions in 1997 NAFTA Law Review III, pp. 82-95 = *dto.* in Joseph J. Norton and Mads Andenas (eds.), Emerging Financial Markets and Secured Transactions (London, Den Haag, Boston 1998), pp. 157-173

Stadler, Astrid, Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion. Eine rechtsvergleichende Studie zur abstrakten und kausalen Gestaltung rechtsgeschäftlicher Zuwendungen anhand des deutschen, schweizerischen, österreichischen, französischen und US-amerikanischen Rechts (Tübingen 1996)

J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch, vol. II, 13th ed. (Berlin 1995); vol. Art. 1, 2, 50-218 EGBGB, 13th ed. (Berlin 1998)

Stiglitz, Joseph E., Economics (New York, London 1993)

Stiglitz, Joseph and Andrew Weiss, (1981) Credit rationing in markets with imperfect information in 71 American Economic Review, pp. 393-410

Stürner, Rolf, Das Grundpfandrecht zwischen Akzessorietät und Abstraktheit und die europäische Zukunft in Ulrich Huber and Erik Jayme (eds.), Festschrift für Rolf Serick zum 70. Geburtstag (Heidelberg 1992), pp. 377-88

Summers, Elizabeth A., Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe in 1997 Review of Central and Eastern European Law 23, pp. 177-203

Tajti, Tibor, Comparative Secured Transactions Law (Budapest 2002)

Tennekoon, Ravi, The Law and Regulation of International Finance (London 1991)

ter Meulen, Edzard, Die Floating Charge - ein Sicherungsrecht am Vermögen einer englischen Company. Ein rechtsvergleichender Beitrag zu den Problemen der Sicherungsübertragung (Frankfurt a.M., Berlin 1969)

Timmermans, Wim, Survey of Legislation on Secured Transactions in Central and Eastern Europe in International Bar Association Eastern European Forum Newsletter Summer 1994, pp. 10-1

Treitel, G.H., An Outline of the Law of Contract, 4th ed. (London 1989); 5th ed. (London, Dublin, Edinburgh 1995)

Triebel, Volker, Stephen Hodgson, Wolfgang Kellenter and Georg Müller, Englisches Handels- und Wirtschaftsrecht, 2nd ed. (Heidelberg 1995)

Tveiten, Margit F., Generalpant for Øst-Europa. En Modell-lov for nasjonale pantelover in Lov og Rett 1995, pp. 188-202

Tyler, E.L.G., Fisher & Lightwood's Law of Mortgages, 11th ed. (London 1997)

Ulmer, Eugen, Urheber- und Verlagsrecht, 3rd ed. (Berlin, Heidelberg, New York 1980)

UNCITRAL, Note by the Secretariat on article 9 of the Uniform Commercial Code of the United States of America in UNCITRAL Yearbook vol. VIII (1977), part 2, II, B = pp. 222-231

Unger, R. The Critical Legal Studies Movement (Cambridge Mass. 1983)

USAID, Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs (Washington DC 1994)

Vorkink, Andrew N., The World Bank and Legal Technical Assistance. Current Issues (Washington DC 1997)

Waelde, Thomas W. and James L. Gunderson, Legislative Reforms in Transition Economies: Western Transplants – A short cut to Social Market Economy Status in 1994 ICLQ 43, p. 345

Weber, Hansjörg, Urteilsanmerkung zu BGH, Urteil vom 30.3.1988 - VIII ZR 340/86 in JZ 1988, pp. 928-30

Weber, Hansjörg, Kreditsicherheiten. Recht der Sicherungsgeschäfte, 4th ed. (Munich 1994); 6th ed. (Munich 1998)

Weber, Max, Wirtschaft und Gesellschaft. Grundriß der verstehenden Soziologie, 5th ed. (Tübingen 1972)

Wenckstern, Manfred, Die englische Floating Charge im deutschen Internationalen Privatrecht in 1992 RabelsZ 56, pp. 624-95

White, James, Secured Lending in Market Economies: Law and Practice in Jonathan Bates, Lane Blumenfeld, David Fagelson, Vladimir Fedorov, Dmitry Labin, Jan-Hendrik M. Röver and John L. Simpson (eds.), International Conference on Secured Commercial Lending in the Commonwealth of Independent States (London, Maryland 1995), pp. 30-2

White, James and Robert S. Summers, Uniform Commercial Code, 3rd ed. (St. Paul/Minn. 1988)

White, James J. and Robert S. Summers, Uniform Commercial Code, 4th ed. (St. Paul/Minn. 1995)

Wiegand, Wolfgang, Kreditsicherung und Rechtsdogmatik in Eugen Bucher and Peter Saladin (eds.), Berner Festgabe zum Schweizerischen Juristentag 1979 dargebracht von der juristischen Abteilung der Rechts- und wirtschaftswissenschaftlichen Fakultät der Universität Bern (Bern, Stuttgart 1979), pp. 283-308

Without author, A Regional Approach to Secured Transactions in Law in Transition Autumn 1992, p. 3.

Without author, Secured Transactions Project in Law in Transition Winter 1992/93, p. 4

Without author, The EBRD's Secured Transactions Project in Law in Transition Autumn 1993, p. 6

Without author, Presentation of the Model Law on Secured Transactions in St Petersburg in Law in Transition Summer 1994, S. 12-4

Without author, A model law with nowhere to go? in Financial Times Eastern European Business Law May 1994, pp. 2-5

Without author, A model way of doing business in East European Banker May/June 1994, p. 14

Wolf, Manfred, Sachenrecht (Munich 1976)

Wood, Philip R., Where Now in World Financial Law? in Butterworths Journal of International Banking and Financial Law 1995, p. 55

Wood, Philip R., Project Finance, Subordinated Debt and State Loans (London 1995)

Wood, Philip R., Law and Practice of International Finance. Comparative Financial Law (London 1995)

Wood, Philip R., Comparative Law of Security and Guarantees (London 1995)

World Bank Legal Department, The World Bank and Legal Technical Assistance. Initial Lessons, Policy Research Working Paper 1414 (Washington DC 1995)

Zweigert, Konrad and Hein Kötz, An Introduction to Comparative Law (translated by Tony Weir) (Oxford 1977); 2nd ed. (Oxford 1987); 3nd ed. (Oxford 1998)

Table of Legislation

Act on pledges in cables ("*Kabelpfandgesetz*") of 31 March 1925 (Germany)

Act on rights in aircrafts ("*Gesetz über Rechte an Luftfahrzeugen*") of 26 February 1959 (Germany)

Act on rights in ships ("*Schiffsrechtegesetz*") of 15 November 1940 (Germany)

Agreement Establishing the European Bank for Reconstruction and Development in Ibrahim F.I. Shihata, The European Bank for Reconstruction and Development. A Comparative Analysis of the Constituent Agreement (London, Dordrecht, Boston 1990), pp. 109-63

Australian Law Reform Commission, Report on Personal Property Securities (Sydney 1993)

Bills of Sale Act (1878) Amendment Act 1882 (England)

Bürgerliches Gesetzbuch 1896 (Germany)

Companies Act 1985 (England)

Contracts (Applicable) Law Act 1990 (England)

Convention on the International Recognition of Rights in Aircraft, Geneva 19 June 1948

Convention on the law applicable to contractual obligations of 19 June 1980 (Rome Convention)

Convention on the Registration of Inland Navigation Vessels, Geneva 25 January 1965, Protocol No. 1 Concerning Rights *in Rem* in Inland Navigation Vessels and Protocol No. 2 Concerning Attachment and Forced Sale of Inland Navigation Vessels

Copyright, Designs and Patents Act 1988 (England)

Einführungsgesetz zum Bürgerlichen Gesetzbuch 1896 (Germany)

English Property Act 1925 (England)

Enterprise Act 2002 (England)

[European Bank for Reconstruction and Development], Economic Review. Annual Economic Outlook September 1993 (London 1993)

European Bank for Reconstruction and Development, Transition report 1994 (London 1994)

European Bank for Reconstruction and Development (ed.), Model Law on Secured Transactions (London 1994) = Stephan Breidenbach and Christian Campbell (eds.), Business Transactions in Eastern Europe, vol. 2 (New York 1997), Appendix 1 = Sudebnik vol. 1 (1996), pp. 587-672 (English text and Russian translation) = Annex (English text) = Jan-Hendrik Röver, Prinzipien, Annex = pp. 191-226 (German translation)

French civil code

Gesetz über die Zwangsversteigerung und die Zwangsverwaltung 1897 (Germany)

Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen 1976 (Germany)

Grundbuchordnung 1897 (Germany)

Handelsgesetzbuch 1897 (Germany)

Hungarian civil code

Insolvency Act 1986 (England)

International Convention for the Unification of Certain Rules Relating to Maritime Liens and Mortgages, Brussels 17 May 1967 (not yet in force)

International Convention on Maritime Liens and Mortgages, Geneva 6 May 1993 (not yet in force)

Land Registration Act 1925 (England)

Law Commission, Report No. 8: A Personal Property Securities Act for New Zealand (Wellington 1989)

Lege cu privire la gaj (Moldova)

Permanent Editorial Board for the Uniform Commercial Code, PEB Study Group Uniform Commercial Code Article 9, Report (December 1, 1992) (Philadelphia 1992)

Pledge Act 1992 (Russian Federation)

Russian civil code 1994

The Law Commission, Consultation Paper No 164, Registration of Security Interests: Company Charges and Property Other Than Land (July 2002)

UNCITRAL Convention on the Assignment of Receivables in International Trade

UNCITRAL Convention on International Bills of Exchange and International Promissory Notes (UNBC)

UNCITRAL Model Law on International Commercial Arbitration

UNCITRAL Model Law on International Credit Transfers

UNIDROIT, 1993, Study LXXII-Doc. 7

UNIDROIT 1993, Report on the 72nd Session of the Governing Council

UNIDROIT, 1994, Study LXXII-Doc. 12

UNIDROIT Principles of International Commercial Contracts

UNIDROIT Convention on International Interests in Mobile Equipment, Cape Town 16 November 2001 and UNIDROIT Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment, Cape Town 16 November 2001

Uniform Commercial Code 1998 with 2001 Amendments (United States)

Zivilprozeßordnung 1877 (Germany)